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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

VIDEO INTERNATIONAL PRODUCTIONS, INC.,

Petitioner,

v.

WARNER-AMEX CABLE COMMUNICATIONS, INC,
and THE CITY OF DALLAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

In this case, the jury found that a City and a franchised cable television provider had conspired to restrain the competition posed by nonfranchised cable television providers, and, in furtherance of the conspiracy, the City had manipulated its zoning ordinance to eliminate the competition, in violation of both the Sherman Act, 15 U.S.C. sections 1 and 2, and 42 U.S.C. section 1983.

The questions presented are as follows:

1. Whether, in an action brought under 42 U.S.C. section 1983, there is any immunity or affirmative defense available to a private party acting jointly with City officials to deprive a competitor of its constitutional rights, as to which the courts of appeals are in conflict.

2. If there is such an immunity or defense, whether its availability is triggered by a City official's subjective belief that the unconstitutional deprivation was in the best interests of the City's residents.

3. Whether the same subjective belief of a City official establishes sufficient grounds to shield the private party from antitrust liability on the basis of the so-called Noerr-Pennington doctrine, when the private party had agreed with City officials on a course of conduct which the private party knew or should have known was illegal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Video International Productions, Inc., [1] respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this case on October 31, 1988.

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[1]Pursuant to Rule 28.1 of the Supreme Court Rules, Video International Productions, Inc. represents that it has no parent company, subsidiaries or affiliates.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 858 F. 2d 1075 and appears as Appendix A hereto. The Fifth Circuit opinion denying the Petition for Rehearing and Suggestion for Rehearing En Banc of the City of Dallas is unreported and appears as Appendix B hereto. The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas (Fitzwater, D.J.) addressing post-trial motions is unreported and appears as Appendix C hereto.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1988. A petition for panel rehearing and suggestion for rehearing en banc was denied on January 23, 1989. This Petition for Writ of Certiorari was filed within ninety days of the denial of panel rehearing and rehearing en banc. This Court's jurisdiction to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. section 1254 (1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. section 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal....

Section 2 of the Sherman Act, 15 U.S.C. section 2, provides in part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor....

42 U.S.C. section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Beginning in August, 1979, Petitioner Video International Productions, Inc. ("VIP") supplied cable television service to apartment complexes in north Dallas. The company installed satellite dish antennae, or earth stations, on the grounds of apartment complexes and ran cable underground to neighboring complexes located within the same block. Since the systems made no use of public property or rights of way, they required no franchise from the City of Dallas. VIP built five separate cable television systems, each with its own satellite dish, which served a total of 28 apartment complexes.

In October, 1980, VIP applied to the Federal Communications Commission for a license to construct a cable television relay service (CARS) station. A CARS license would permit the company to link its cable systems together via microwave transmission from a single origination point at the company's headquarters in Dallas. This would allow the company to expand more economically as well as enable it to transmit original programming produced at a studio at its headquarters. On May 12, 1981, VIP became the first nonfranchised cable system operator to be granted a CARS license by the FCC.

While VIP was establishing its operations in Dallas, the City was in the process of awarding a franchise to provide cable service throughout the City. In October, 1979, the City Council decided to franchise one cable operator for the entire City. In November, 1980, the Council chose Warner-Amex Cable Communications, Inc. ("WAX") as the sole cable franchisee.

Warner and the City entered into a franchise agreement, which was enacted as an ordinance by the City Council. As part of the agreement, WAX agreed to pay 5% of its gross revenues as a franchise fee. Section seven of the ordinance provided: "No CATV system shall be allowed to occupy or use the streets of the City or be allowed to operate within the City without a CATV franchise." The ordinance defined a cable television or "CATV" system broadly, but specified it did not include any system that served "only subscribers in one or more multiple unit dwellings under common ownership, control or management, and does not use City rights-of-way." The ordinance definition of a CATV system included the operations of VIP, since they served apartment complexes that were separately owned, and so section seven of the franchise ordinance prohibited VIP's operations within the City.

Consistent with the franchise ordinance, the City began to impose restrictions on nonfranchised cable operators in Dallas. Two days after the adoption of the franchise ordinance, Silver Screen, a competitor of VIP, obtained a building permit which stated that the company's earth stations could not provide service outside the apartment complex where it was being installed, and that Silver Screen could not charge the tenants it served without obtaining a City franchise. Afterwards, building permits issued to VIP contained similar restrictions, or such restricitons were written onto approved blueprints.

Silver Screen challenged the City's claim that the company needed a franchise to operate by filing an appeal with the City's Board of Adjustment, the body authorized to establish zoning policy for the City. Silver Screen's appeal was considered over the course of two meetings of the Board of Adjustment. Silver Screen contended that no franchise was necessary because the company's operations made no use of City streets or rights of way. The City ultimately acknowledged that no franchise could be required of private businesses that made no use of City property. Nevertheless, at the request of Ray Couch, the City's chief zoning inspector, the City's Board of Adjustment formally ruled in March, 1981 that nonfranchised cable services could not extend over private property lines to serve separately owned apartment complexes, even if there was no incursion onto public property.

Approximately a month later, in April, 1981, Silver Screen's attorney proposed to another City body that the zoning code be modified.

The purpose of the proposed modification was to establish that nonfranchised cable systems that did not cross public streets or rights of way could serve separately owned apartment complexes, contrary to the ruling of the Board of Adjustment. In effect, the modification would have amended section seven of the franchise ordinance by permitting nonfranchised cable systems to operate within the City.

The proposal set off a round of meetings and telephone calls between representatives of the City and WAX to develop a zoning theory that would permit WAX's cable operations but prohibit those of its nonfranchised competitors. At a May 18 hearing, WAX and City witnesses spoke against the proposal. WAX's position was that the proposal violated WAX's understanding with the City. A City official testified that the amendment would allow commercial ventures in residential areas and that nonfranchised operators would not be subject to the duties placed on the franchisee. The proposal was unanimously rejected.

WAX soon became more aware of the competitive threat posed by VIP's operations. WAX learned from VIP's president that the company had been awarded a CARS license. WAX realized that the CARS license gave VIP the ability to expand its operations and made it a more potent competitor. WAX determined that VIP had a sophisticated system and that its subscription list was limited only by VIP's access to the capital necessary to expand the system.

WAX executives obtained a copy of VIP's application for its CARS license from the FCC. Richard Davis, the head of WAX's Dallas operation, then met with Tom James, the City's director of public utilities whom Davis considered WAX's "facilitator" at the City. Davis gave James a copy of VIP's FCC filing, told James that the CARS license gave VIP the opportunity to expand its operations, and suggested there might be zoning violations involved. James then conducted his own investigation of the apartment complexes served by VIP.

In late July 1982, an article appeared in a cable trade magazine that stated that VIP would soon have the potential to serve approximately 200,000 subscribers in the City. According to the article, VIP was in the process of being sold to a top cable operator that was anxious to compete head to head in the market with WAX. A WAX official was quoted as admitting that WAX was greatly vulnerable to VIP's window on the market.

After reading the article, Davis called James and asked what the City was doing about VIP. Soon afterward, James called a meeting of City officials to discuss the implications and possible courses of action with respect to the operation of VIP in Dallas. At the July 31 meeting, the prospect of the City pursuing VIP for zoning violations and the competitive implications for WAX were discussed. The matter was referred to the City's chief zoning inspector. City officials kept in close contact with WAX regarding the status of the investigation.

Another trade magazine carried an article about VIP in its August 24 edition. The article reported that a group composed of long-time WAX opponents was taking over VIP. It also stated that the City had launched an investigation of possible zoning violations by VIP. Tom James was quoted as stating that WAX and his office had been discussing VIP for some time.

On September 2, the City Council approved a request by WAX for permission to provide cable service by microwave in north Dallas, ahead of the schedule established in the franchise ordinance, in order to compete with VIP and other nonfranchised cable operators. At the same time, the Council received a full briefing on alleged zoning violations by VIP. The Council directed the City Attorney to enforce the City's zoning laws against VIP if the company was in fact operating the way it was described.

On September 3, Richard Davis wrote to his WAX superiors in New York that the City had served notices of zoning violations on the apartment complexes served by VIP and that the City intended to seek injunctions against the complexes if they did not remove VIP's services within fifteen days.

In fact, the City did not serve the notices of violation on VIP until September 11. In August, the owners of VIP had entered into a contract to sell their stock to a group known as the Campbell Family Partnership. The sale was to close on September 16. On September 15, after the notices of zoning violations had been received, the Campbells called off the sale. The Campbells eventually purchased VIP's assets in October, for $1.245 million less than they had agreed to pay for its stock in August.

The notices of zoning violations cited sections of the zoning

ordinance pertaining to "accessory" uses and to commercial radio or television transmitting stations. The City's theory of violation was based on an interpretation of these sections. According to this theory, if an earth station served only one apartment complex, it was permissible under the zoning ordinance as an accessory use. However, should cables extend over private property lines to serve another separately owned complex, even by use of a properly recorded easement, the system became a commercial television transmitting station, which was not permitted in residential areas.

According to the City's interpretation, if a block contained ten apartment complexes, all separately owned, VIP could install ten earth stations on the block and serve each complex individually. It could not, however, serve all ten complexes by the more efficient and less intrusive means of installing one earth station on the block with underground cable running along easements to the other complexes. This interpretation of the zoning ordinance results in a restriction on nonfranchised cable systems that is identical to the one contained in section seven of the franchise ordinance.

After taking over VIP's assets in October, 1981, the Campbells reactivated VIP's systems that had been shut down after receipt of the notices of violations. The City filed suit against the Campbells, alleging the same zoning violations asserted against VIP. On June 8, 1982, the City filed a motion for nonsuit requesting that the case against the Campbells be dismissed because the City no longer wished to prosecute. The City subsequently amended section seven of the franchise ordinance to remove the provision that no nonfranchised cable systems would be permitted to operate in the City.

VIP brought this action against WAX and the City in September, 1981. It claimed that the defendants had joined in an anticompetitive conspiracy in violation of sections 1 and 2 of the Sherman Act; had deprived VIP of its constitutional rights in violation of 42 U.S.C. section 1983; and had tortiously interfered with the contract for the sale of VIP's stock to the Campbells.

The case was tried to a jury in October and November, 1986. The jury returned a verdict in favor of VIP and against both defendants on all three theories of liability. The jury awarded damages as follows: zero for the antitrust violations; $200,000 in compensatory damages

on the section 1983 violations and $2.5 million in punitive damages against Warner; and $1.245 million in compensatory damages on the tortious interference violation and $250,000 in punitive damages assessed against each defendant. The damages awarded on all claims totalled $4.445 million.

Both defendants moved for judgment notwithstanding the verdict. The trial court granted the motion in favor of the City only with respect to the tortious interference with contract claim. The court granted the motion in favor of WAX on all three claims, on the ground of the so-called Noerr-Pennington doctrine.[2]

VIP and the City appealed. By decision dated October 31, 1988, the Fifth Circuit affirmed in part, reversed in part, and remanded. The court ruled that the tortious interference claim was properly dismissed against the City on the basis of sovereign immunity. It also ruled that the jury verdict against the City on the antitrust and section 1983 claims should not be set aside. In connection with the antitrust claims, the court explained:

> There was sufficient evidence for the jury to determine that WAX and the City were engaged in anticompetitive activity in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. sections 1, 2. In particular, the jury reasonably could have read the evidence to indicate that the City and WAX had agreed to restrain the competition posed by VIP and other similar companies and, in furtherance of this agreement, the City had manipulated the zoning ordinances to eliminate such competition. [p. 20a, infra].

The court affirmed the trial court's entry of judgment n.o.v. in favor of WAX on the basis of the Noerr- Pennington doctrine. It found that WAX was exercising its First Amendment right to petition government when it joined with the City in the scheme to eliminate WAX's

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[2] The Noerr-Pennington doctrine establishes that antitrust liability generally does not attach to efforts by private parties to petition government for actions that may have anticompetitive consequences. See California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

nonfranchised competitors in Dallas through manipulation of the zoning ordinance.

The court rejected VIP's argument that the "co-conspirator" exception to the Noerr-Pennington doctrine applies when a petitioning party knows or should know that what it is seeking is illegal. Instead, the court stated, "the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception." [p. 13a, infra]

The court concluded that City officials may have perverted the zoning ordinance for a purpose other than that for which it was intended, but this "was not in any way a personal or selfish purpose, however; rather, it was to further the best interests of the City." [p. 14a, infra] The court reasoned that the subjective motivation of the City officials was sufficient to render inapplicable the co-conspirator exception to Noerr-Pennington and so served to immunize WAX from the same antitrust liability for which the court found the City responsible.

The court also found the same reasoning sufficient to immunize WAX from liability under section 1983. That is to say, the subjective motivation of the state actor provided an immunity or defense from section 1983 liability for a private party jointly engaged in the deprivation of constitutional rights.

The case was remanded to the district court for a new trial on VIP's damage claims against the City on the antitrust and section 1983 claims, as well as for consideration of the possible application of the Local Government Antitrust Act of 1984, 15 U.S.C. section 35, to the antitrust damage claim against the City.

REASONS FOR GRANTING THE WRIT

The writ should be granted to correct the court of appeals' unwarranted reliance on the subjective motivation of a state actor to create an immunity of defense for a private party jointly engaged with a state actor to deprive another of his constitutional rights. The court of appeals' journey through this unsettled area of the law is directly at odds with the rulings of this Court that individual immunities from section 1983 liability be based upon objective inquiries. The approach

also is incompatible with the underlying purpose of section 1983 and will have pernicious consequences if left unreviewed. This case also presents an opportunity for the Court to reaffirm the importance of the antitrust laws in ensuring free and unfettered competition in the marketplace.

I. THE COURTS OF APPEALS ARE IN CONFLICT REGARDING AFFIRMATIVE DEFENSES OR IMMUNITIES AVAILABLE TO PRIVATE PARTIES JOINTLY ENGAGED WITH STATE ACTORS IN DEPRIVATIONS OF CONSTITUTIONAL RIGHTS.

The Fifth Circuit ruled that the absence of a "venal" motive on the part of City officials in agreeing to manipulate the zoning ordinance to eliminate competition from VIP was sufficient to absolve WAX from the jury's finding of liability under section 1983. The court did not clearly spell out whether it was recognizing an affirmative defense or an immunity for WAX, or whether it was holding that the agreement between WAX and the City fell outside the scope of section 1983 altogether.

In any event, the effect of the court's ruling is to create a basis for a private party to escape liability under section 1983. The court of appeals thus addressed an issue upon which this Court has not yet spoken with authority. The lack of clear direction from the Court has resulted in a wide divergence of views among the courts of appeals.

The court noted the possibility of a type of good faith affirmative defense for private parties charged under section 1983 in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). In response to Justice Powell's concern that private individuals might be held responsible for innocently invoking seemingly valid state laws later held to be unconstitutional, the Court explained:

> In our view ... this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially reponsible for the availability of a good-faith defense, or qualified immunity, to state officials.

> We need not reach the question of the availability of such a defense to private individuals at this juncture.

457 U.S. at 942 n. 23.

The courts of appeals that have reached the issue have come to conflicting conclusions. The First and Ninth Circuits have held that private actors are not entitled to qualified or "good faith" immunity. Howerton v. Gabica, 708 F. 2d 380, 385 n.10 (9th Cir. 1983); Downs v. Sawtelle, 574 F. 2d 1, 15-16 (1st Cir.), cert. denied, 439 U.S. 910 (1978). The Fifth and Eighth Circuits have held that such immunity is available for private defendants. Buller v. Buechler, 706 F. 2d 844, 850-53 (8th Cir. 1983); Folsom Investment Co. v. Moore, 681 F. 2d 1032, 1037-38 (5th Cir. 1982). In an en banc decision that generated four opinions expressing a wide divergence of views, the Eleventh Circuit recently recognized good faith immunity for private parties as well. Jones v. Preuit & Mauldin, 851 F. 2d 1321, 1323-1325 (11th Cir. 1988) (en banc), vacated, 57 U.S.L.W. 3549 (U.S. Feb. 21, 1989). Taking a somewhat different tack, the Sixth Circuit has ruled that private parties may not claim good faith immunity in section 1983 cases, but may be able to assert an affirmative defense grounded in good faith. Duncan v. Peck, 844 F. 2d 1261 (6th Cir. 1988).

Many of the preceding decisions arose in the context of section 1983 challenges to various prejudgment attachment procedures. The Fifth Circuit's opinion in this case illustrates a substantially different approach that some courts have employed when their analysis begins with the Noerr-Pennington doctrine. See, e.g., Evers v. County of Custer, 745 F. 2d 1196 (9th Cir. 1984); Racetrac Petroleum, Inc. v. Prince George's County, 601 F. Supp. 892 (D. Md. 1985), aff'd per curiam, 786 F. 2d 202 (4th Cir. 1986). Here, the emphasis is on the private party's First Amendment right to petition. The courts have looked more at subjective motivation rather than the type of objective good faith inquiry that has marked recent developments in section 1983 law. The Fifth Circuit's decision here appears to be the first to apply this approach to a case featuring proof of an actual agreement leading to a constitutional deprivation.

The breadth and depth of the conflicts both between and within[3] the circuits on the existence of an immunity or good faith defense for private parties in section 1983 litigation demonstrate the need for clear guidance from this Court.

II. THE FIFTH CIRCUIT'S RECOGNITION OF AN IMMUNITY FOR PRIVATE PARTIES IN SECTION 1983 LITIGATION BASED ON THE SUBJECTIVE GOOD FAITH OF GOVERNMENT ACTORS ESTABLISHES A DANGEROUS DOCTRINE THAT IS BASED ON FAULTY REASONING AND THE MISAPPLICATION OF PRECEDENT.

If some sort of immunity or affirmative defense is appropriate for private parties in section 1983 litigation, it certainly should not take the form of the defense created by the Fifth Circuit in this case. There are at least four significant errors evident in the Fifth Circuit's reasoning.

First, the court's analysis is premised upon concern for WAX's First Amendment right to petition government. But emphasis on WAX's right to petition is misplaced in the factual context of this case. The right to petition presupposes a distance between the petitioner and the state actor petitioned. It assumes that the state actor will consider the views expressed and assign them such weight as is deemed appropriate.

A party's right to petition is due considerably less deference when it has entered into a conspiracy with a governmental entity in a fraudulent or illegal scheme, as the jury found here. The right to petition should no more immunize WAX's involvment than it should have excused the potential section 1983 liability of S.H. Kress & Co. for joining together with the Hattiesburg police in an agreement to refuse service and subject to arrest members of integrated groups of diners in Adickes v. Kress & Co., 398 U.S. 144 (1970)

Second, the court misread Dennis v. Sparks, 449 U.S. 24 (1980) in concluding that WAX could not be liable under section 1983 unless a

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[3] There is no principled way to reconcile the Fifth Circuit's recognition of an objective good faith test for immunity for private parties in section 1983 actions in Folsom Investment Co., supra, with the court's adoption in this case of a test for private party immunity based entirely on the subjective state of mind of a third party.

state actor had joined in a conspiracy with WAX for a "selfish or otherwise corrupt motive." [p. 13a, infra] In Dennis v. Sparks, the Court explained that a section 1983 action against private parties accused of conspiring with a judge was not subject to dismissal, even though the judge was immune from liability. The court did not suggest that a "corrupt" conspiracy, as interpreted by the Fifth Circuit here, was necessary before private parties could be liable under section 1983, only that such a conspiracy is a sufficient basis for liability.

In Dennis, the Court ruled that private parties could be liable under section 1983 even when the state actor with whom they conspired enjoys immunity. This holding does not support the Fifth Circuit's conclusion here that a private party may be excused from liability even when the state actor with which it conspired remains liable under section 1983.

Third, the Fifth Circuit improperly dismissed the seriousness of the corruption that is demonstrated in the record of this case. What VIP alleged and the jury found was that in issuing notices of zoning violations to VIP and its customers, the City did not intend to further any of the zoning goals that circumscribe its power to act in this area. Rather, working in cooperation with WAX and pursuant to their agreement, the City invoked its zoning enforcement authority as an unfettered source of power to achieve its anticompetitive goal. This misuse of City power for nongovernmental ends establishes corruption. The court's implicit characterization of the defendants' conduct as essentially benign if ultimately misguided ignores the danger to our governmental processes posed by a conspiracy to pervert state power to achieve an illegal and anticompetitive goal.

Finally, the court's focus on the subjective motivation of the City actors is entirly misplaced. Section1983 is designed to protect citizens from constitutional deprivations inflicted under color of state law, no matter how well intentioned the state actors may be. As the First Circuit explained in a similar context, a section 1983 defendant's claim of subjective good faith "would not justify a qualified immunity for constitutional purposes any more than would the belief, if asserted by a discriminatory employer or educator, that minority group members are happier and more productive in a segregated environment." Downs v. Sawtelle, 574 F. 2d 1, 12 (1st Cir.), cert. denied, 439 U.S. 910

(1978). Of course, the subjective test created by the Fifth Circuit is even more suspect because it turns upon the state of mind, not of the defendant claiming the defense, but of a third party.

Not only is the Fifth Circuit's test unsupported by the case law and insupportable in logic, it would also have pernicious consequences. The most obvious is that it would open the door to inquiry into the state of mind of state officials that this Court quite deliberately shut in Harlow v. Fitzgerald, 457 U.S. 800 (1982). There the Court explained, "Judicial inquiry into subjective motivation ... may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." 457 U.S. at 817 (footnotes omitted). Since such inquiries are barred when the liability of a state actor is at stake, there is no reason to permit such an examination to determine the liability of a third party.

Also, the Fifth Circuit's test can lead to perverse results. In the type of conspiracy to deprive another of constitutional rights that is at issue here, an individual state actor would likely not be able to claim good faith immunity, since the evidence would likely show violations of clearly established rights. Under the Fifth Circuit's test, the individual state actor would have the advantage of joint liability with the conspiring private parties if he acted corruptly. However, if the state actor's conduct cannot be characterized as corrupt in the Fifth Circuit's sense of the term, the state actor would face liability alone. It makes little sense for a state actor to be better off in a practical sense if he can demonstrate that he acted for improper personal motives than if his conduct was wholly unselfish though still wrong.

Finally, in rejecting VIP's argument that WAX should not escape liability if it knew or should have known that what it was seeking from the City was illegal, the court has sanctioned invitations to lawlessness. According to the court's approach, a private party can encourage a state official to take action he knows to be illegal, and can do all in his power to see that the illegal actions are taken, so long as he does not seek to persuade through some "corrupt" means. The state actor may well be liable under section 1983 if the illegal acts amount to a constitutional deprivation, but, as here, the private party can escape all responsibility by wrapping himself in the cloak of the First Amend

ment. The right to petition does not compel this result any more than the First Amendment insulates co-conspirators from liability under criminal law.

III. THE COURT SHOULD ADOPT AN APPROACH TO THE NOERR-PENNINGTON DOCTRINE THAT IS CONSISTENT WITH WHATEVER IMMUNITY OR AFFIRMATIVE DEFENSE IT RECOGNIZES FOR PRIVATE PARTIES IN THE SECTION 1983 CONTEXT.

The Fifth Circuit arrived at the result it did on the section 1983 issues in part because its inquiry began with a consideration of WAX's claimed Noerr-Pennington defense to the antitrust claims. As the court recognized, there is a symmetry to these issues.

The Noerr-Pennington issue involved in this case may be of less enduring significance than the section 1983 issue, since the Local Government Antitrust Act of 1984 establishes that the issue will not often arise in the future. Nevertheless, if the Court should address the section 1983 issues, it should adopt a similar approach to the Noerr-Pennington issues.

Specifically, VIP has argued that WAX should not be able to claim Noerr-Pennington protection from antitrust liability if it knew or should have known that what it was seeking was illegal. Indeed, the jury was instructed, "Only where the defendant knew or should have known that the action he sought was illegal or improper would imposition of liability be appropriate." (Jury Charge at 11)

The Fifth Circuit rejected this approach, in part because it concluded that WAX's First Amendment rights outweighed the interests sought to be furthered through the antitrust laws. This Court should address the issue. In particular, it would be beneficial for the Court to point out that the type of antitrust conspiracy that was proved here has far more dangerous consequences than the Fifth Circuit recognized. The court seemingly accepted at face value the assertion that the destruction of WAX's competition and hence the elimination of the possibility that Dallas residents would be able to choose among competing providers of cable service "further[ed] the best interests of the City." [p. 14a. infra]

Such a view is sharply at odds with this Court's expressions of the key role the antitrust laws play in ensuring the vitality of a competitive marketplace. As the Court explained in United States v. Topco Associates, 405 U.S. 596, 610, (1972), "Antitrust law in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

In this case, the benefits of a potentially competitive marketplace for cable services in north Dallas have been shortchanged in a decision that failed to even acknowledge that there were competitive interests at stake. A further reason to grant this petition is that it would provide the Court an opportunity to emphasize once more that the values of free and unfettered competition enshrined in the Sherman Act are not to be sacrificed so lightly.

CONCLUSION

For the reasons set forth, Petitioner respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,
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April 20, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-1572

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

WARNER-AMEX CABLE COMMUNICATIONS, INC., *et al.*,
Defendants-Appellees,

THE CITY OF DALLAS,
Defendant-Appellee,
Cross-Appellant.

Oct. 31, 1988

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Video International Productions, Inc. ("VIP"), a non-franchised cable television company in Dallas, Texas, sued the City of Dallas ("the City") and Warner-Amex Cable

Communications, Inc. ("WAX"), the sole franchised cable television company in Dallas, for attempting to put VIP out of business, primarily through the use of zoning ordinances. VIP argued three theories before the district court: antitrust and civil rights violations, and tortious interference with a contract to sell VIP. The jury found liability under all three theories, and awarded VIP zero damages for its antitrust claim; $200,000 compensatory and $2.5 million punitive damages for its civil rights claim; and $1.245 million actual and $500,000 punitive damages for the tortious interference with contract claim. The district court granted judgment n.o.v. with regard to all claims against WAX and the tortious interference claim against the City. VIP appeals the judgment n.o.v., and also challenges the jury's zero damage award for the antitrust claim. The City cross-appeals, challenging the jury's verdict on the civil rights claim. The parties also dispute myriad smaller issues, such as pre- and post-judgment interest and attorneys' fees.

We affirm most of the judgment of the district court as relates to liability, but remand for a new trial on damages because we are unable to discern a reasonable explanation for the jury's wide-ranging verdicts under the three claims, especially after the major portion of damages under the tortious interference claim has been invalidated.

I

As we review the district court's decision to overturn a portion of the jury's verdict and the City's challenge to the remainder of that verdict, we examine the facts in the light most favorable to VIP and the jury's verdict.

VIP, a cable television business formed to supply cable services to apartment complexes in north Dallas, began operating in August 1979. VIP installed satellite dish

antennae (earth stations) on the premises of various apartment complexes and, through underground cables, transmitted the satellite signals received by the satellite dishes to individual apartments. Each satellite dish served the host complex as well as neighboring but separately owned apartment complexes. The cables crossed private property lines but none of VIP's systems utilized City property or public rights of way. Because VIP operated entirely on private property, it did not obtain a cable television franchise from the City. VIP built five separate cable television systems, each with its own satellite dish, which served 28 apartment complexes and approximately 2,000 subscribers and had the potential to reach 6,000 subscribers.

In October 1980, VIP applied to the Federal Communications Commission ("FCC") for a permit to construct a cable television relay service ("CARS") station, which the FCC granted. The CARS facility would enable VIP to link its several cable television systems to transmit locally produced programs and to increase substantially its ability to establish additional cable systems in apartment complexes.

At approximately the same time that VIP had commenced its operations, the City began negotiations concerning a cable television franchise in the City. In October 1979 the City voted to franchise one cable operator for the entire city, and the City council, on November 5, 1980, awarded the franchise to WAX. WAX was given the right to operate the cable television network within the City, and in turn the City was to receive a five percent per annum franchise fee. The franchise is essentially the right to use public streets and rights-of-way for equipment installation.

The franchise agreement which the City reached with WAX contained a provision ("Section 7") that stated: "No CATV system shall be allowed to occupy or use the

streets of the city or be allowed to operate within the City without a CATV franchise." The franchise agreement defined "CATV system" as:

> a system of antennas, cables, wires, lines, towers, waveguides, or other conductors, converters, equipment or facilities, designed and constructed for the purpose of producing, receiving, transmitting, amplifying and distributing, audio, video and other forms of electronic or electrical signals, located in the City. *This definition shall not include any facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management, and does not use City rights-of-way.*

Section 1.b (emphasis added). Pursuant to these provisions, building permits that the City issued to non-franchised cable companies subsequent to reaching the franchise agreement contained restrictions which earlier building permits had not contained. Silver Screen, a competitor of VIP, obtained a building permit two days after the adoption of the franchise agreement which stated that the antennae could not serve outside the apartment complex where it was being installed, and that Silver Screen could not charge the tenants it served without obtaining a City franchise. Afterwards, building permits issued to VIP contained similar restrictions, or such restrictions were written onto approved blueprints.

Silver Screen challenged the City's ability to impose such restrictions on cable companies that did not have a franchise. At a public hearing before the City Board of Adjustment on February 24, 1981, Silver Screen's attorney argued that the City could not require a franchise if the system did not use or cross public streets or rights-of-way. The City's chief zoning inspector testified: "We [the City] feel that a corporation coming in and making these installations is a commercial enterprise and would

constitute a commercial business in an MF-1 zoning district." Silver Screen, however, wished only to relieve itself of the restriction against charging for its services; its system apparently did not cross private property lines.

At its March meeting, the City announced that the Building Inspector's office had abandoned its claim that Silver Screen could not charge for its services. Thus, Silver Screen obtained all the relief it sought. The chief zoning inspector persisted in his position, however, and was given approval of the interpretation of the zoning code that cable services could not cross public rights-of-way *or* private property lines. This interpretation was apparently based upon the categorization of cable facilities as commercial, which would then require them to fit within the "accessory use" provision of the Dallas City Code to be allowed in a residential area. An accessory use is a "use customarily incident to a main use." One of the requirements of the accessory use provision is that the thing in issue must be located on the same lot as the main use (in this case, the apartment complex it serves), and must not be across a street or alley from the main use. Dallas Development Code Sec. 51-4.217(a).

A month after the Board of Adjustment adopted this interpretation of the zoning code, Silver Screen's attorney proposed a modification to the accessory use provision to allow nonfranchised cable systems that did not cross public streets to serve separately owned apartment complexes.

There is evidence in the record of numerous telephone calls and meetings among City officials and with representatives of WAX prior to the May 18 hearing on the proposed zoning amendment. WAX representatives informed the City that they believed the proposed amendment would amend Section 7 of the franchise agreement. At the hearing before the Zoning Ordinance Advisory Committee ("ZOAC"), which makes recommendations on

proposed zoning amendments, both the City official in charge of administering the franchise and an attorney from WAX testified against the proposed amendment. The WAX attorney argued that the proposed amendment would violate WAX's understanding with the City. He also noted that nonfranchised systems did not pay the City the five-percent fee as WAX did, and that they were not subject to WAX's programming restrictions. The City official testified that the amendment would allow commercial ventures in residential zones, and that nonfranchised operators would not be subject to the duties placed on the franchisee. ZOAC unanimously decided to recommend against adopting the proposed amendment.

During this time, WAX also began to compile a file on VIP's north Dallas cable business. WAX determined that VIP had a sophisticated system with the CARS license and its subscription list was limited only by the capital to expand the system. After this determination, WAX executives obtained a copy of VIP's CARS license from the FCC and then met with City officials concerning VIP. WAX executives asked City officials to investigate VIP's zoning violations further. In July an article appeared in Cablevision Magazine regarding VIP's business and its threat to WAX. After reading the article, a WAX executive called City officials and discussed VIP's business. WAX then issued a memorandum to City officials regarding possible right-of-way violations that VIP had committed. The memo concluded "a meeting has been scheduled for 10:00 AM on July 31 in the city attorney's conference room to discuss the implications and possible courses of action to take with respect to the operation of VIP in Dallas." VIP was not invited to any of the meetings. During the following weeks, WAX and the City contacted each other several times concerning VIP's operations and possible zoning violations. On August 24 another article concerning VIP appeared in MultiChannel News and indicated that a long-time WAX

competitor, the Campbell Family Partnership, was attempting to buy VIP's business. The article included a statement by one City official that "Warner-Amex and our office have been discussing [VIP] for some time." On September 2 the City council, upon a request by WAX, granted WAX permission to provide cable service to north Dallas, three years ahead of WAX's franchise schedule. On September 3, an executive with WAX informed its national office that the City had delivered zoning violations to twenty-three apartment complexes served by VIP. On September 4, WAX filed a petition with the FCC in opposition to VIP's request to transfer its CARS license to the Campbell Family Partnership which was attempting to buy VIP at the time. In WAX's petition, it noted that the City had issued zoning violations to VIP. The sale of VIP stock to the Campbells was set to close on September 16 and the City actually served the violation notices on September 11. The apartment owners and VIP were given fifteen days to remove VIP's cables. The basis upon which the City relied for citing VIP was section 51-4.217 of the City code, which required that accessory uses be located on the same lot as the main use. The City interpreted this to mean cables could not cross private property lines. VIP, in a letter dated September 14, informed the City that the notices of violations were illegal and demanded that they be withdrawn by September 15. It also informed the City that the company's business was scheduled to be sold on September 16 and that the City was impairing VIP's ability to close the sale with the Campbell Family Partnership. On September 15, the Campbells' attorney informed VIP that they could not purchase VIP's business because of the City's zoning citations. VIP subsequently shut down its operating system for a few days. VIP shortly re-started its system, and then began negotiating with the Campbells again and entered into an agreement to sell all of its assets to the Campbells in return for the Campbells assuming VIP's liabilities. The

difference between the price the Campbells paid for VIP's assets in October and the price that they had agreed to pay for the corporation's stock in August was $1.245 million.

After taking over VIP, the Campbells reactivated the system and the City filed suit against Campbell. On June 8, 1982, the City filed a motion for a nonsuit requesting that the case be dismissed because they no longer wished to prosecute the Campbells. That motion was granted and the City subsequently amended Section 7 of the franchise agreement to remove the provision that no unfranchised cable system would be permitted to operate in the City.

II

VIP sued the City and WAX for alleged antitrust and section 1983 violations, and tortious interference with the contract between VIP and Campbell Family Partnership. At trial, the jury found for VIP on all three claims and awarded damages as follows: $0 for antitrust violations; $200,000 compensatory damages and $2.5 million in punitive damages for section 1983 violations; and $1.245 million in actual and $500,000 in punitive damages for tortious interference with contract for potential plaintiffs Frank Parrish and Jack Weiss. (Parrish and Weiss did not join the suit as plaintiffs and the defendants objected to the award of damages for tortious interference with contract because VIP was not a party to the contract in question. VIP then sought to add Parrish and Weiss as partners in this lawsuit.)

WAX and the City then moved for judgment notwithstanding the verdict, and VIP moved for judgment on the verdict and for a new trial on the issue of damages for the violations of the antitrust laws. The district court found that WAX's actions were protected by the first amendment right to petition the government (*Noerr-Pennington* immunity), that there was sufficient evidence to support the jury's finding that the City had

violated VIP's first amendment right to free speech (section 1983), and that the City had not tortiously interfered with VIP's contract because it did not have the requisite knowledge of the contract. The district court did not directly address the City's antitrust liability, probably because of the zero damage award under that theory. In its discussion of WAX's liability and the *Noerr-Pennington* doctrine, however, the district court reasoned that there was insufficient evidence to find an illegal conspiracy between WAX and the City. Thus the court held that VIP was entitled to recover only $200,000 of actual damages from the City, together with reasonable attorney's fees, expenses and costs of $378,194.90 under its section 1983 action. The court denied VIP all other relief.

VIP filed this appeal, arguing that WAX's and the City's actions fell within an exception to the *Noerr-Pennington* doctrine, and that the jury's verdict against WAX should stand; that the trial court erred in concluding that there was insufficient evidence that the City had knowledge of the contract to uphold the jury's verdict on tortious interference with a contract; that the damages the jury awarded were not duplicative and that VIP is entitled to a new trial on the issue of antitrust damages; and that VIP is entitled to prejudgment interest.

The City cross-appealed, arguing that the district court lacked jurisdiction; that the City had not deprived VIP of any constitutional right to support a section 1983 claim; that the contract interference claim must fail because it was instituted by the wrong party; that a city cannot be liable for common-law intentional tort or punitive damages; that VIP had not proved various elements of its contract interference claim; that VIP had not suffered damages and had, in any event, failed to mitigate damages; that VIP was not entitled to attorneys' fees; that *Noerr-Pennington* protected the City as

well as WAX; and that the City was immune from damages under the Local Government Antitrust Act of 1984.

III

To aid the analysis in this case, we think it helpful to lay out the basic scenario that VIP claims underlay the actions of WAX and the City:

WAX and the City included section 7 in the franchise agreement in order to exclude other cable companies from operating in Dallas without a franchise. This arrangement benefitted both parties since by refusing other franchises, WAX would have exclusive access to Dallas customers, and the City would receive a five percent annual fee on all of WAX's business that it would not receive on the business of unfranchised cable companies.

At some stage, it became clear that the City did not have authority to require a franchise of cable companies that did not use public streets or rights-of-way to string their cables. It is not clear when the City and WAX realized this, but on appeal they concede this fact. It is the crossing of public ways that gives the City the right to require a franchise. *West Texas Utilities Co. v. City of Baird*, 286 S.W.2d 185 (Tex. Civ.App—Eastland 1956).

According to VIP, when WAX and the City realized that they could not require a franchise of cable companies whose lines did not cross public streets, they began searching for another way to accomplish the same goal. Between WAX and the City, they devised a theory under the zoning law that satellite dishes were commercial and thus had to fit within the "accessory use" provision of the zoning code. The dishes, therefore, could serve only those complexes where they were installed. VIP's scenario requires the inference that this categorization of satellite dishes as "commercial" was a means to accomplish the illegal goal in the franchise

agreement. As we analyze the individual issues in this case, we will consider both whether the jury had sufficient evidence to support VIP's scenario and whether this scenario, if proved, fulfills the requirements of the various claims.

A.

We turn first to discuss the applicability in this case of the *Noerr-Pennington* doctrine, and the exceptions to that doctrine. WAX argues and the district court found that this doctrine protects WAX's activities from liability. VIP responds that the "co-conspirator exception" to the doctrine applies to WAX, and that the doctrine therefore does not shield WAX from antitrust and other liability.

The *Noerr-Pennington* doctrine and the exceptions to it grew from two Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U,S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The essence of the doctrine is that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent. Thus, railroads that embark on advertising campaigns designed to convince the legislatures to pass laws detrimental to the trucking industry are not subject to antitrust liability for those actions even though their ultimate goal is to drive truckers out of business and limit competition. Similarly, "petitions" made to the executive or judicial branches of government, e.g., in the form of administrative or legal proceedings, are exempt from antitrust liability even though the parties seek ultimately to destroy their competitors through these actions.

Possible exceptions to this doctrine were first noted in *Noerr* and *Pennington* and have since developed more

fully. Our reading of both the law in general and the briefs in this case indicates that there is a substantial amount of confusion over the extent of and distinction between these exceptions. We will thus explain our interpretation of these exceptions based upon their purposes.

Much of the confusion surrounding the doctrine and its exceptions arises from the lack of a definition of, and distinction between, two separate exceptions: the "sham" exception and the "co-conspirator" exception. These two separate ideas are often confusingly interchanged in the case law, and therefore also in the parties' briefs. Nonetheless, we discern these two ideas as separate and deriving from slightly different policy objectives.

The "sham" exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that "petitions" the government by engaging in administrative processes only to preclude or delay its competitor's access to those processes may be liable for antitrust damages under the "sham" exception. There is much debate about how a court can tell when a petition is not genuine. We need not busy ourselves with this problem, however, since it is apparent that, despite frequent referral to it by the briefs and the courts below, the "sham" exception does not apply in this case. WAX petitioned City officials to obtain and/or maintain a certain interpretation of the zoning code. WAX's intent was to obtain that interpretation, not to prevent VIP's gaining access to government or waste VIP's resources in fighting the interpretation. This finding is supported by the fact that WAX succeeded in attaining its goal of a zoning code inter-

pretation that prevented cables from crossing private property lines. Although on its own such success might not be sufficient to prove that the petitioning activity is not a sham, *see In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir.1987) (see both majority and concurring opinions), neither party seriously contends that WAX did not seek the end for which it petitioned.

Rather, VIP asserts that the "co-conspirator" exception to the *Noerr-Pennington* doctrine may apply even when the petitioner actually seeks the object of its petition. We agree that although sometimes a sham petition may coincide in a case with an illegal conspiracy with government officials, it need not always do so, and it is the illegal conspiracy that is the essence of this second exception to the *Noerr-Pennington* doctrine. We must thus examine whether such an illegal conspiracy existed between WAX and City officials sufficient to activate the co-conspirator exception.

Our reading of the cases involving the "co-conspirator" exception demonstrates that this exception has been applied in cases where a government official or body has been influenced by the petitioner through some corrupt means. *See, e.g., Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir.1984). Although WAX argues that the exception will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception.

The case before us presents a new twist. In this case, the officials may have perverted the zoning regulations for a purpose other than that for which it was intended.

It was not in any way a personal or selfish purpose, however; rather, it was to further the best interests of the City. That is, the City shared with WAX a desire to reduce the business of other cable companies and increase that of WAX. This mutual goal arose because the City received a five percent franchise fee from WAX that it did not receive from the other companies. The City thus had an incentive to seek out and enforce laws against other cable companies that would result in decreasing their share of the cable business and increasing WAX's share.

We will consider the propriety of the City's enforcement later in this opinion; however, we think the propriety of the City's motives is irrelevant in evaluating WAX's liability for encouraging the City to enforce its zoning code.

The point of the *Noerr-Pennington* doctrine is to protect private parties when they petition the government for laws or interpretations of its existing laws even though those private parties are pursuing their goals with anticompetitive intent. To hold WAX liable because the City itself had anticompetitive intent for its own economic reasons would place too great a burden on WAX's first amendment right to petition the government. In such a case, WAX would not only have to discern the City's true motives before petitioning for its zoning interpretation, it would have to withhold its petition altogether if it determined that the City might act on it for anticompetitive reasons. Otherwise, the submission of the petition alone might subject WAX to antitrust liability if it were ultimately determined that the City acted for the anticompetitive reasons it shared with WAX and that it had no zoning interest upon which to base its enforcement. The fact that in this case the City may have shared WAX's anticompetitive intent does not remove the protection of the *Noerr-Pennington* doctrine from WAX's lobbying activities.

VIP has not demonstrated any evidence of personal corruption or other venal motive on the part of the City officials who supported WAX's petitions. WAX cannot be liable, therefore, for exercising its first amendment right to petition the government. The district court correctly excused WAX from antitrust liability in this case.

Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations. *See, e.g., Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980), and cases cited therein. We find it easy to agree that the same rationale under antitrust law that supports WAX's petitions to the City also serves to protect WAX from the tort claim. There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.

The section 1983 claim presents more difficulty, although we ultimately arrived at the same result. The difficulty arises from the fact that section 1983 itself protects constitutional rights, so our reasoning must involve a more careful balancing of interests. In order for a private party to be liable under section 1983, it must have acted under color of state law. WAX's first amendment petitioning of the City does not constitute action under color of state law unless WAX acted as a co-conspirator with the City in violating Video's constitutional rights. *Dennis v. Sparks*, 449 U.S. 24, 26, 101 S.Ct. 183, 185, 66 L.Ed.2d 185 (1980). It is true that the evidence here supports the skeletal elements of a conspiracy between the City and WAX, that is, an agreement to accomplish an alleged illegal object and acts in furtherance of that object. But the Supreme Court noted (in the context of petitioning a court for an injunction),

"merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.* at 28, 101 S.Ct. at 186. The element in *Dennis* that converted the private actors into co-conspirators acting under color of law was that they engaged in a "*corrupt* conspiracy involving bribery of a judge." *Id.* at 28, 101 S.Ct. at 186 (emphasis added). As we have already concluded, there is insufficient evidence here to support the theory of a corrupt conspiracy that would deny WAX the protection of the *Noerr-Pennington* doctrine. We think that if *Noerr-Pennington* is to have its intended effect at all, an analysis of whether the petitioner is a co-conspirator under section 1983 must parallel the co-conspirator exception with *Noerr-Pennington.* This conclusion is fully consistent and consonant with the language of the Supreme Court in *Dennis* ("private parties who *corruptly conspire* with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases"). *Id.* at 29, 101 S.Ct. at 187 (emphasis added). Otherwise, first amendment petitioning could be challenged in the section 1983 context as a denial of equal protection, a taking of property without just compensation, a first amendment violation, or other constitutional claim, thus vitiating *Noerr-Penningon* protection. Further, we believe that the equation of section 1983 state action with the *Noerr-Pennington* co-conspirator exception sufficiently guards those constitutional rights that section 1983 serves to protect.

Thus, we hold that any behavior by a private party that is protected from antitrust liability by the *Noerr-Pennington* doctrine is also outside the scope of section 1983 liability. To hold otherwise would effectively cast a cloud over a broad range of causes that are brought before courts, legislatures, or governmental agencies. For these reasons, the district court correctly excused WAX from section 1983 liability in this case.

B.

We next address whether the City can be held liable for tortious interference with a contract under Texas common law. The contract in question is that between the shareholders of VIP and Campbell Family Partnership to sell VIP. The jury found both the City and WAX liable for $1.245 million compensatory and $500,000 punitive damages. The district court overturned the jury's verdict in regard to WAX's liability, because it was again covered by the *Noerr-Pennington* doctrine. As to the City, the district court found there was insufficient evidence to show that the City had the requisite knowledge of the existence of the contract with which it had allegedly interfered. We agree with the district court that WAX is protected by the *Noerr-Pennington* doctrine. Although we are less certain that the jury lacked sufficient evidence upon which to find that the City had knowledge of the contract, we do not reach this issue since we find that the City's sovereign immunity prevents VIP's claim of tortious interference with a contract.

Under the Texas Tort Claims Act (Tex. Civ. Prac. & Rem. Code §§ 101.001, *et seq.* (Vernons 1986)), the City is not liable for intentional torts, and contract interference is such an intentional tort. *Tippett v. Hart*, 497 S.W.2d 606 (Tex. Civ. App.—Amarillo 1973, *writ ref'd n.r.e* 501 S.W.2d 874 (Tex. 1973). Furthermore, we need not address VIP's contention that the City failed to raise its immunity in the district court, since "[W]hen the judgment of a district court is correct, it may be affirmed for reasons not given by the court and not advanced to it." *Laird v. Shell Oil Co.*, 770 F.2d 508, 511 (5th Cir. 1985).

VIP argues that the City does not have sovereign immunity when it is performing a proprietary rather than a governmental function. The law is settled that a city's

enforcement of its zoning code is an exercise of its police powers, a governmental function. *City of West Lake Hills v. City of Austin*, 466 S.W.2d 722, 726 (Tex.1971); *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970); *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W.2d 475 (1934).

VIP's complaint in this case arises from the City's enforcement of its zoning code, including sending out zoning violation notices which had the effect of impeding the expansion and continuation of VIP's business. These actions were clearly taken within the City's governmental-police power authority. VIP argues that the City was performing a proprietary function because of its relationship with WAX in the franchise agreement. First, however, it is clear that the actions of which VIP complains were taken pursuant to the City's zoning authority. Second, we do not think that a five percent franchise fee for a service rendered to the citizens by a private company places the government in a proprietary capacity even if the government were acting as administrator of the franchise in the actions of which VIP complains, which it was not.

C.

(1)

VIP next contends that it is entitled to a new trial on the issue of antitrust damages. Although the jury found that the City and WAX were liable under the antitrust theory, they allotted zero damages to this claim. We have struggled to follow the Supreme Court's admonition to search for a view of the case that makes the jury's answers to special interrogatories consistent, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962), but we can find no view that reconciles the jury's damage awards under the section 1983 and contractual-interference tort claims with the zero damage award under the antitrust claim.

VIP tried this case as one set of facts demonstrating a single injury for which the jury could find liability under any one or all of three theories. VIP argued that it was injured by an agreement between WAX and the City that led to the issuance of the zoning violations and affected the value of VIP's business, and that this set of facts demonstrated violations of antitrust, civil rights (equal protection, due process and free speech) and Texas tort laws. The case was not presented, tried, or argued as one in which discrete damages had been suffered under each claim. Although liability arguments under each theory may have been advanced on different parts of the evidence, it seems clear that damages under each theory rested on identical facts, that is, the loss of business and customers because of the City's application of its zoning laws as reflected by VIP's loss in revenues and value between the first and second contracts of sale to the Campbells. Thus, one would expect the jury's respective damage awards to be virtually the same. The jury's lopsided apportionment of damages therefore makes us think it likely that the jury decided the total amount it wished to award and apportioned it *among* the theories, rather than awarding duplicative damages on each separate theory in approximately the same amount. We would be less concerned that the jury divided its total damage award inconsistently among the theories if the district court (and we) had not eliminated the damage award under the claim for tortious interference with contract. It was under that theory that the jury awarded VIP the major part of its damages, and now we have eliminated that portion of the award. Because we are most uncertain, and the parties offer little plausible explanation, why the jury allotted zero damages for antitrust violations and a major sum for contract interference when both theories are supported by the same set of facts, we think equity requires that VIP should have another chance before the jury to prove whether, under the re-

maining two theories, VIP is entitled to greater damages than it would receive with the tort claim eliminated and no remand. Furthermore, as we have indicated, damages under the section 1983 claim are based upon identical facts as the antitrust and contract-interference claims and yet the jury returned a verdict of only $200,000. Because we are remanding on damages based upon the confusing conflict among the various awards, we think it necessary to remand for damages on both remaining theories, that is, section 1983 and antitrust, to allow the new jury to write on a clean slate, and to avoid possible duplication and other confusion.

(2)

This holding, of course, is based upon the fact that the jury did find that WAX and the City were liable for antitrust and civil rights violations. As previously explained, however, WAX cannot be held liable under either issue. The City's arguments that *Noerr-Pennington* protects it from antitrust liability fail, however. There was sufficient evidence for the jury to determine that WAX and the City were engaged in anticompetitive activity in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. In particular, the jury reasonably could have read the evidence to indicate that the City and WAX had agreed to restrain the competition posed by VIP and other similar companies and, in furtherance of this agreement, the City had manipulated the zoning ordinances to eliminate such competition. WAX, however, is protected by its position as a private party petitioning the government. *Noerr-Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment.

The City argues, however, that equity demands that the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1985 Supp.), which protects local governments com-

pletely from liability for antitrust damages, should apply retroactively. We leave this question to the district court which did not address it, because one of the factors that needs to be considered in determining the propriety of retroactive application is the financial harm a treble damage award could inflict on a municipality and its taxpayers. 130 Cong.Rec. H.12, 187 (Daily Ed. Oct. 11, 1984) (remarks of Rep. Fish). Until the jury has determined the damage award under the antitrust theory, we have no way of evaluating the harm to the municipality. Once the damage award has been determined, the district court may then evaluate the City's claim that the Local Government Antitrust Act of 1984 should apply retroactively.

D.

VIP's arguments as to prejudgment and postjudgment interest are moot now that we have set the judgment aside.

IV

A.

Turning to the issues in the City's cross-appeal, we deal first with its arguments about the section 1983 claim. Many of the City's arguments relating to this claim revolve about the City's contention that it never reached a final decision regarding VIP's zoning problems because VIP did not bring its complaint to the highest authority, that is, the Board of Adjustment, for a final interpretation. We disagree that there was no "final decision" cognizable under section 1983. The building inspector had requested and received the Board of Adjustment's interpretation of the zoning code during the Silver Screen case. He had clearly made this request for guidance in his duties. According to the City, the Board of Adjustment *is* the final decision making authority on these issues. Thus, the building inspector was acting pursuant to his authority from the Board in sending out the zoning

violations. *See Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir.1984). The combination of the zoning policy decision by the Board and the issuance of the violation notice by the highest City official empowered to execute it, resulted in a policy decision that can be attributed to the City. *St. Louis v. Praprotnik*, —— U.S. ——, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). The fact that VIP could appeal for a possible variance, or could urge the Board to reconsider and change its prior expressed policy, does not render nonfinal the decision made pursuant to and in accordance with established policy. Furthermore, we agree with the district court that, as part of the first amendment violation, the building inspector's sending of zoning violation notices to VIP and all of its customers (without prior warning or notice to VIP) and informing them that they had fifteen days to cease use of the cable system gave the jury sufficient evidence to determine that this City action caused an immediate chilling effect on VIP's first amendment rights, as evidenced by the fact that numerous customers were understandably upset and informed VIP promptly that they wish to cease receiving its service. The building inspector was clearly the final authority in regard to the decision to implement established policy by sending out the violation notices. There was no effective appeal that could retract the effect that those notices had upon VIP's business and freedom of speech.

The City's argument that VIP could have applied for a variance does not affect the fact that the zoning violation notices were issued pursuant to City policy with immediately resulting injury to VIP. As to damages, the jury was entitled to conclude that VIP's decision to shut down its operations for a few days was a reasonable reaction to a notice requiring it to shut down its operations, and that it may have taken some time for VIP to realize the extent of its options. When the jury considers damages on remand, it should consider whether

VIP could have mitigated damages by applying for a variance to the Board of Adjustment.

There was also sufficient evidence to support the jury's section 1983 verdict on the first amendment theory, since the jury could reasonably have found that the City's actions failed to satisfy the test for time, place and manner restrictions of speech, within the meaning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Pursuant to this authority, the City had to demonstrate *both* that the restraints furthered a substantial government interest and that they allowed reasonable alternative avenues of communication. *Id.*, 106 S.Ct. at 928. We need not decide the first prong of this test, whether the zoning regulation in this instance furthered any substantial governmental interest, since the restraint on Video's speech failed the second prong. The jury was justified in finding that the City's abrupt issuance, without notice to VIP, of zoning violation notices to it and all of its customers did not leave reasonable alternative avenues of communication. We need not address the question whether the avenues need be commercially viable, since in this case VIP's initial notice required it to shut down within fifteen days. Clearly the jury was entitled to find that, at least for a short time, VIP's free speech was paralyzed, and also to find that VIP may have suffered long-term damages as a result of this temporary paralysis.

We repeat that on remand of the issue of damages, the jury should be instructed about mitigation of damages and be allowed to evaluate whether VIP's failure to pursue the City's avenues for relief from established policy meant that the City is not liable for the entire amount of VIP's losses between the first contract to sell and the second. On retrial, the district court should also take care to assure that the damages that the jury awards under section 1983 are not duplicative of any awarded under the antitrust claim, and should render judgment accordingly.

We agree with the district court that we need not examine the other constitutional claims (taking, equal protection) that VIP asserted to support its section 1983 claim. The first amendment violation is sufficient to support the jury's finding of liability. We are, however, for reasons we earlier noted, remanding the case for an entirely new trial on all damages, including those attributable to this section 1983 claim.

B.

We believe that the explanations above make it clear that the jury was entitled to infer that the City's conduct was the proximate cause of VIP's injuries. The City offers other reasons why VIP's stock value may have declined, but it does not sufficiently exclude the jury from concluding that the City's own actions, including its arrangements with WAX, its interpretation of the zoning code, and its issuance of violation notices to VIP and its customers, played the predominant and major role in that decline.

The City also argues that the only evidence of any damages suffered was the $1.245 million, which was the difference between the contract for sale of VIP before and after the zoning violation charge. The City argues that this amount was lost by Parrish and Weiss, VIP's stockholders, not VIP itself. It further argues that since there is no evidence of the amount of damages sustained by VIP, it is not entitled to any actual or punitive damages. We disagree. The value of VIP's stock or assets reflects the value of the corporation, and any diminution in value represents damage to that corporation, on which it can sue. Thus, VIP may claim its compensatory damages. The City, however, is not liable for any punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981).

C.

As to the attorneys' fees awarded by the district court, the validity of the amount is moot since we have set aside the damage verdicts pending a new trial. The district court should reconsider this question after the jury renders its new award.

V

We affirm the district court's well reasoned opinion on all grounds except that we find necessary a new trial on all questions of damages for the reasons we have stated. The court's instructions on damages should include the issue of mitigation. We have noted our special concern, for example, whether, after the cancellation notices were sent to VIP's customers and before the final sale to the Campbells, VIP should have appealed the building inspector's decision to the Board of Adjustment, and, if so, whether its damages would have been reduced. The district court should consider the applicability of retroactive application of the Local Government Antitrust Act of 1984 subsequent to the jury's reevaluation of damages. The district court should also have special concern that the ultimate damages VIP receives are not duplicative. There can be no punitive damages awarded against the City, and the district court's decisions on attorneys' fees must be reconsidered after retrial. WAX, of course, is excused from all liability and all further proceedings in this case.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

GARWOOD, Circuit Judge, concurring in part and dissenting in part:

I concur in all of Judge Jolly's persuasive opinion except as it holds the City of Dallas liable under the Sherman Act and for First Amendment violations under section 1983 on account of the issuance by its building

inspection department of notices that VIP was in violation of the accessory use provisions of the Dallas Development Code. In the context of this case, such action by the City's building inspection department is not, in my view, an adequate basis on which to impose liability because it was without any legal significance and did not constitute the City's legally final determination that a zoning violation had occurred.

The City did not cut off VIP's utilities or take any kind of physical action against VIP; it did not institute suit or procure any type of restraining order; no permit or other requests by VIP were denied by the City. VIP has not explained how the notices in question constituted legally anything more than the formal expression of opinion of the building inspection department that VIP was in violation of the zoning ordinance.[1] Under the ordinances of the City, and under Texas Local Government Code, § 211.010(c), VIP could have appealed to the City's Board of Adjustment and challenged the building inspection department's construction of the accessory use provisions of the ordinance; VIP could have also thus sought a variance from the Board of Adjustment.[2] In the event of such appeal, all action by the building inspection department or other City officials would have been entirely stayed pending resolution of the appeal.[3]

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[1] Had the accessory use provision of the Dallas ordinance been construed to have the meaning which the building inspection department understood it to have, that would not have rendered the ordinance facially unconstitutional.

[2] It is true that, under Texas Local Government Code, § 211.009(c), the building inspection department's notices may have had the legal effect of requiring a four-to-one or five-to-zero vote in VIP's favor at the Board of Adjustment in order for VIP to prevail on an appeal. However, as VIP never took an appeal, this is irrelevant.

[3] Section 211.010(c) provides:

> "(c) An appeal stays all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies in writing to the board facts supporting the official's opinion that a stay would cause imminent peril to life

Although the Board of Adjustment had previously indicated its agreement with the building inspection department's construction of the ordinance in the Silver Screen case, nevertheless VIP was not a party to that proceeding, the issue was not actually presented there, and the Board of Adjustment did not have the benefit of conflicting arguments being made to it by the parties. It was not shown to be a foregone conclusion that the Board of Adjustment would adopt the same construction of the accessory use provisions of the ordinance in an appeal by VIP, or that it would deny VIP a variance. The Board of Adjustment, which is as much an agency of the City of Dallas as is the building inspection department, is the City's final authority for interpreting its zoning ordinances and granting variances therefrom. That, coupled with the lack of any relevant legal effect of the building inspection department's violation notices, renders it inappropriate to hold the City liable merely because such notices were issued. A final decision by the City, with actual concrete legal injury, was not shown to have ever occurred. *Cf. Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3120, 87 L.Ed.2d 126 (1985); *City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S.Ct. 915, 924, 926, 99 L.Ed.2d 107 (1988).

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or property. In that case, the proceedings may be stayed only by a restraining order granted by the board or a court of record on application, after notice to the official, if due cause is shown."

It is obvious in this case that the exception "imminent peril to life or property" would not be applicable.

While the Dallas Development Code authorizes the building inspection department to have utilities disconnected in case of zoning violations, the City never did this. Although its violation notice threatened to take such action after fifteen days, the fifteen-day period was sufficient for appeal to the Board of Adjustment and such appeal by its stay provisions would have prevented any such action. I also observe that under the Dallas Development Code it is a defense to prosecution that the person prosecuted is in compliance with an order of the Board of Adjustment, even if the party's action would otherwise constitute a violation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1572

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
Plaintiff-Appellant
Cross-Appellee,

versus

WARNER-AMEX CABLE COMMUNICATIONS, INC., *et al.*,
Defendants-Appellees,

THE CITY OF DALLAS,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 31, 5 Cir., 1988, —— F.2d ——)

(January 23, 1989)

Before GOLDBERG, GARWOOD and JOLLY Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

Judge Johnson did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-81-1772-D

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
Plaintiff,

vs.

WARNER-AMEX CABLE COMMUNICATIONS and
the CITY OF DALLAS,
Defendants.

MEMORANDUM AND ORDER

[Filed May 19, 1987]

Plaintiff, Video International Productions, Inc. ("VIP"), a non-franchised cable television operator conducting business in Dallas, Texas, sued the City of Dallas, Texas ("City") and Warner-Amex Cable Communications, Inc. ("WAX"), the franchised Dallas cable television operator, for alleged violations of the antitrust laws and of VIP's civil rights and for tortious interference with contract. After a trial, the jury found that VIP was entitled to recover $2.7 million in actual and punitive damages for violations of the antitrust laws. The jury also found that potential plaintiffs,[1] Frank Parrish and Jack

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[1] Parrish and Weiss did not join the suit as parties-plaintiff. On motion for directed verdict defendants correctly contended that VIP could not recover for tortious interference with contract because VIP was not a party to the contract in question. VIP then

Weiss, were entitled to recover $1.745 million in actual and punitive damages for tortious interference with contract. WAX and the City have moved for judgment NOV. VIP has moved for judgment on the verdict and for a partial new trial as to the jury's finding that VIP had incurred no damages for violations of the antitrust laws. The court concludes that WAX's actions were protected by its First Amendment right to petition the government, that the City violated VIP's First Amendment right to free speech, and that neither defendant tortiously interfered with contract. Accordingly, the court holds that VIP is entitled to recover from the City the sum of $200,000 as actual damages,[2] together with its reasonable attorney's fees, expenses, and costs in prosecuting its § 1983 action.

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sought leave to add Parrish and Weiss as parties. A number of arguments have been presented regarding whether Parrish and Weiss should be allowed to join the lawsuit after it has been pending for five years (and after VIP had rested its case in chief) and whether the court should exercise pendent party jurisdiction over a state law claim with respect to which there was not complete diversity of citizenship at the time suit was filed. Because the court concludes below that WAX's interference, if any, was the result of activities protected under the *Noerr-Pennington* doctrine and that the city did not possess the requisite knowledge of the existence of the contract, the court does not decide whether Parrish and Weiss should be made plaintiffs to this civil action.

[2] The court *sua sponte* raised the question whether *Memphis Community School District v. Stachura*, —— U.S. ——, 106 S.Ct. 2537 (1986), bars the recovery by VIP of actual damages for a § 1983 violation. Because the court concludes that the jury's award of $200,000 does not constitute an award of nominal damages, the court holds that *Stachura* does not preclude such recovery. VIP is not entitled to recover punitive damages from the City under § 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (municipality immune from punitive damages).

I.

BACKGROUND FACTS AND PENDING MOTIONS

A. Background Facts

VIP, a business formed to supply cable television service to apartment complexes in North Dallas, began operating in August 1979. VIP installed satellite dish antennas (earth stations) on the premises of apartment complexes and, by means of underground cable transmitted the satellite signals received by the earth stations to individual apartments. Each earth station served the host complex as well as neighboring but separately owned apartment complexes. VIP's cable crossed private property lines but none of VIP's systems utilized city property. Because VIP operated entirely on private property, it did not obtain a cable television franchise from the City. VIP built five separate cable television systems in North Dallas, each with its own earth station, which served 28 apartment complexes and approximately 2,000 subscribers.

In October 1980, VIP applied to the Federal Communications Commission ("FCC") for a permit to construct a cable television relay service (CARS) station.[3] A CARS facility would have enabled VIP to link its several cable television systems, to transmit locally produced programs, and to increase substantially its ability to establish additional cable systems in apartment complexes. VIP became the first non-franchised cable-systems operator in the United States to receive a CARS license when the FCC granted the license on May 12, 1981.

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[3] A CARS station is a microwave transmitter which receives television signals from a satellite earth station and distributes those signals through the air by microwave to several separate cable television systems. A prerequisite for VIP's obtaining the permit was that each of VIP's systems serve apartment complexes under different ownership.

At approximately the same time that VIP commenced operations, the City was entering the final stages of determining the manner in which cable television service would be provided to City residents. In October 1979, the City Council voted to franchise one cable operator for the entire city. After one year of intense competition by would-be cable franchisees, the City Council on November 5, 1980 awarded the franchise to WAX.[4] The agreement, which was adopted as City Ordinance No. 16738, provided that no other community antenna or cable television service (CATV) would be permitted to operate in Dallas as long as WAX was the franchisee. The franchise applicants, including WAX, had to commit to abide by many conditions imposed upon them by the City, to serve all the geographic segments of Dallas within a certain time frame, and to charge City-approved rates. The chosen franchisee was also required to pay the City a 5% per annum franchise fee.

Following the 1980 award of the franchise to WAX, unfranchised operators who sought building permits to construct cable systems on private property were issued building permits that prevented charging a fee without first obtaining a cable franchise from the City Council. This restrictions was imposed upon another cable operator, Silver Screen, in November 1980 and upon VIP in December 1980. The City thereafter restricted unfranchised systems from crossing property lines with cable, even if the line did not traverse a public right-of-way. Silver Screen appealed the Building Official's[5] rul-

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[4] On April 4, 1981, City voters approved the awarding of the franchise to WAX. The election was conducted pursuant to a provision in Texas law which permits citizens to challenge, by means of an election, the awarding of a city franchise. WAX opposed the holding of the election but the City ruled against WAX and concluded that the election must be held.

[5] The Dallas Development Code provides that the Building Official is empowered to issue permits and certificates of occupancy in accordance with and to enforce the provisions of Chapter III of the Development Code. *See* Dallas Development Code § 51.3.105.

ing that Silver Screen could not charge for its service, but did not appeal the decision that it could not extend its service across property lines. The Building Official thereafter withdrew the contention that Silver Screen needed a franchise but the Dallas Board of Adjustment adopted the policy that unfranchised cable operators could not cross property lines. The effect of such a rule was to permit unfranchised operators to exist in a legal sense, but to so restrict their operations as to make them economically unfeasible.

In April 1981, Louis Nichols, a Dallas attorney who represented Silver Screen, wrote a letter to Eli Martinez, a staff member of the Zoning Ordinance Advisory Committee ("ZOAC"), a group which makes recommendations on proposed amendments to the City Plan and Zoning Commission.[6] Nichols requested an amendment to an existing Dallas zoning ordinance known as the "accessory use provision" of the Dallas Development Code, § 51-4.217, to permit cable television operators to cross property lines. The ZOAC scheduled a hearing on the proposal.

Prior to the hearing, counsel for WAX met with Martinez and Tom James, Director of Public Utilities for the City, to discuss the Nichol's proposal. James was responsible for overseeing the City's public utilities and for administering the franchise ordinance that governed WAX's cable operations. WAX urged that the Dallas Development Code not be amended. James indicated that he would oppose the adoption by ZOAC of the proposed zoning amendment and Martinez indicated that the staff would recommend against it. WAX's treatment as a "local utility" for zoning purposes was also discussed. At the hearing, ZOAC heard presentations from Nichols and James, from WAX's legal counsel, and from Martinez,

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[6] The City Plan and Zoning Commission serves as an advisory board to the City Council concerning amendments to zoning ordinances.

who presented the staff recommendation. ZOAC voted unanimously not to recommend amending the zoning ordinance. ZOAC's determination was consistent with an earlier interpretation of the "accessory use provision" by the Board of Adjustment during its review of Silver Screen's building permit application.

Shortly thereafter, Richard Davis, president of WAX, visited Frank Parrish, president of VIP. Parrish described VIP's business to Davis, including the grant of the CARS license. After meeting with Parrish, Davis discussed VIP and its operations with his superiors in New York.

Later, Davis met with James and provided him copies of VIP's application for the CARS license and of the FCC decision granting the license. Davis told James that WAX thought VIP was violating the zoning ordinance by crossing property lines with its cables and suggested that James investigate the matter. Several days after this meeting James spearheaded an investigation of VIP's systems.

In late July, Davis and James read an article in *Cablevision*, a cable television trade magazine, which suggested that VIP had the potential to reach a vast number of subscribers in the Dallas market. James sent a memo to the Building Official, Tom Jones, setting forth his belief that VIP was violating the provision of the Dallas cable franchise which forbade the operating of a cable television system without a franchise. A meeting was convened to discuss VIP and its operations. The meeting was attended by Jones, his assistant, Sam Harting, and Chief Zoning Inspector Ray Couch. The policy which had been announced by the Board of Adjustment in the Silver Screen case was given further definition. VIP's earth stations were categorized as commercial television transmission stations as defined in Dallas Development Code § 51-4.202(6) because cables from the each stations

crossed property lines. James requested that the Building Inspector investigate the matter.

During the course of the Building Inspector's investigation, counsel for WAX contacted James from time to time to check on the status of the investigation. James advised WAX's counsel that he believed the City would issue citations if cables running from VIP's earth stations were crossing property lines. The Building Inspector ultimately determined, as a result of the investigation, that VIP's cables were crossing property lines in violation of the "accessory use provision" and that VIP was illegally operating a commercial radio or television station within a residential area. The City subsequently issued citations to VIP and certain apartment complex owners based on the provisions of the Dallas Development Code, §§ 51-4.217 and 51-4.202(6), prohibiting such activity.

On August 12, 1981, VIP stockholders executed an agreement to sell their VIP stock to the Campbell family. In anticipation of the stock purchase agreement, VIP applied to the FCC for authority to transfer its newly acquired CARS license to Cable Dallas, Inc., a company owned by the Campbell family. WAX opposed the transfer, principally upon the premise that VIP was "trafficking" an FCC license. WAX submitted its opposition to the FCC pursuant to FCC procedures.

On September 2, the Dallas City Council was briefed on the zoning violations allegedly committed by VIP. The City Council instructed City officials to issue citations if VIP was in fact crossing property lines. At the same council meeting, WAX petitioned the City Council for authority to provide interim cable service to the North Dallas area, which was then being served by VIP and other companies.[7] This authority was granted on the

[7] WAX was required by its franchise to serve this area but was not scheduled, under its construction plan, to wire North Dallas until approximately three years later.

condition that such activity would not interfere with WAX's ability to wire other portions of the city in accordance with the franchise.

In September 1981, VIP and apartment complexes receiving VIP cable television service were served with notices requiring removal, within 15 days, of the cable television facilities. The notices of violation cited §§ 51-4.202(6) and 51-4.217(a)(4) of the Dallas Development Code.

The closing of the Campbell's purchase of VIP had been scheduled for September 16, 1981. As a consequence of the issuance of the notices, the Campbells declined to close. On October 15, the Campbells contracted with Parrish and Weiss to purchase VIP's assets for $1.245 million less than they had agreed to pay for the stock. Shortly before the agreement was signed, VIP, at the request of the Campbells, ceased its operations for three days in order to comply with the zoning violation notices.

B. Pending Motions

The City moves for judgment NOV on these grounds: (1) this court lacks subject matter jurisdiction over VIP's federal claim; (2) this court lacks jurisdiction over Parrish's and Weiss' common law claims; (3) there was no final decision by the City to enforce the Dallas Development Code against VIP and, thus, no taking of VIP's property; (4) there was no taking because none of VIP's property was physically appropriated, damaged, devalued, or destroyed; (5) there was no decision by the Board of Adjustment to enforce the Dallas Development Code against VIP and thus no deprivation of constitutional rights caused by a City policy; (6) VIP is not the real party in interest; (7) there is no evidence that there was any restraint of VIP's First Amendment rights; (8) the City did not tortiously interfere with the stock purchase contract because there is no evidence that

the City knew of the contract; (9) cities cannot be liable for punitive damages under the Civil Rights Act, 42 U.S.C. § 1983; (10) cities have sovereign immunity against suits arising out of the enforcement of zoning regulations; (11) cities cannot be liable for punitive damages in common law tort actions; (12) there is no evidence that the City's conduct was a proximate cause of VIP's damages; (13) VIP could have avoided any injury and failed to do so; (14) there is no evidence that VIP suffered any damages; (15) the jury's finding of puntive damages for civil rights violations is excessive; and (16) the jury's findings of actual damages for the civil rights claims and for the contract interference claim are duplicative.

WAX moves for judgment NOV on these grounds: (1) WAX's conduct was protected by the First Amendment and therefore WAX is not liable under the antitrust laws, the civil rights laws, or for tortious interference with contract; (2) WAX is not subject to § 1983 liability because there is no evidence that WAX was acting "under color of" state law, there was no violation of law that would serve as a predicate offense for a § 1983 claim, and WAX acted pursuant to a presumptively valid zoning law which was enforced against VIP (which law WAX neither knew nor reasonably should have known was unconstitutional); (3) WAX is not liable for tortious interference with contract because there was no evidence of knowing or intentional interterference without legal justification, all of WAX's actions were privileged under the First Amendment, and the addition as plaintiffs of Parrish and Weiss (who, rather than VIP, would have such a claim) must be denied as improper, their claim is barred by the statute of limitations, and the court lacks subject matter jurisdiction over their claim; (4) VIP, Parrish, and Weiss are not entitled to punitive damages under § 1983 or for tortious interference because there has been no showing

of actual malice by VIP and WAX is entitled to a remittitur because the punitive damages are excessive and unreasonable in relation to the actual award; and (5) WAX is entitled to judgment on VIP's Sherman Act claims because the jury found no actual damages and its findings of liability should be disregarded because all of WAX's actions are protected under the First Amendment.

Plaintiff, VIP, moves for judgment on the verdict and for a partial new trial as to the jury's finding that it had incurred no damages for violations of §§ 1 and 2 of the Sherman Act. VIP also seeks attorney's fees and expenses, costs, and prejudgment interest on the jury's tortious interference award.

II.

DISCUSSION

A. Tortious Interference with Contract

The jury found that the City and WAX tortiously interfered with the Weiss-Parrish contract with the Capmbell family partnership. City argues that there is no evidence that it knowingly and intentionally interfered with the contract. WAX contends that its activities were protected by the First Amendment and that any act of interference was undertaken with legal justification. The court agrees.

In order for Parrish and Weiss to prevail on their tortious interference with contract claim, they must have proved, among other requirements, that defendants knowingly and intentionally interfered with a valid existing contract. *Marcus, Stowell & Beye Government Securities, Inc. v. Jefferson Investment Corp.*, 797 F.2d 227, 235 (5th Cir. 1986) (Texas law); *Armendariz v. Mora*, 553 S.W.2d 400, 404 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.). In order to prove knowledge, the evidence must establish that the City had actual knowledge of the contract in question or knowledge of facts and cir-

cumstances that would lead a reasonable person to believe that the contract existed. *Steinmetz & Associates, Inc. v. Crow*, 700 S.W.2d 276, 277-78 (Tex.App.—San Antonio 1985, writ ref'd n.r.e.).

The evidence at trial established that, in July 1981, Public Utilities Director James read an article in *Cablevision* magazine which reported that VIP was "in the process of being sold to a top MSO." Weiss and Parrish assert that a person could reasonably have inferred from this information that "there was some sort of contractual relationship" and thus the City had sufficient knowledge to meet the knowledge element of the tort of interference with contract. The court disagrees.

Although actual notice includes knowledge of all facts that a reasonable inquiry would have disclosed, the duty of inquiry extends only to those matters fairly suggested by facts really known. *Steinmetz*, 700 S.W.2d at 280. Circumstances that merely arouse a reasonably prudent person's suspicions are insufficient to charge notice. *Id.*[8] The phrase "in the process of" connotes an incomplete transaction in which the absence of a final contract is equally as plausible, if not more so, than a completed contract. Further, the article in question does not identify the "top MSO." Absent other evidence showing the MSO was the Campbell family, there is no basis in the trial record for concluding that the City had actual knowledge of the contract. Nor, from this sketchy reference, would the City have been under a duty to inquire into the details of the contract, assuming the City could have surmised from the magazine blurb that a contract existed.

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[8] There is a difference between suspicion and knowledge. Suspicion is doubt, an absence of trust. Knowledge is a clear perception of fact, an awareness of truth. "Suspicion and conjecture or surmise based upon it is not knowledge or means of knowledge." *Steinmetz*, 700 S.W.2d at 280. The realm of suspicion and conjecture based upon it do not fall within the bounds of implied knowledge. *Id.*

Thus, the court holds that the evidence points so strongly and overwhelmingly in favor of the conclusions (1) that the City had no knowledge of the contract, and (2) that the matters fairly suggested by facts really known would not have disclosed such knowledge upon reasonable inquiry, that reasonable jurors could not have arrived at a contrary verdict. *See Knight v. Texaco*, 786 F.2d 1296, 1298 (5th Cir. 1986) (judgment NOV standard). Accordingly, the City is entitled to judgment notwithstanding the verdict with respect to the tortious interference with contract claim.

WAX argues, *inter alia*, that its activities were protected by the First Amendment. Under Texas law the act of interference must be without legal rights or justifiable cause. *State National Bank v. Farrah Mfg. Co.*, 678 S.W.2d 661, 689 (Tex.App.—El Paso 1984, writ dism'd). For the reasons set forth below, the court agrees with WAX that any interference was legally justified and, accordingly, grants WAX's motion for judgment notwithstanding the verdict.

B. *Noerr-Pennington* Doctrine

The jury found that WAX violated the Sherman Act, violated VIP's civil rights, and tortiously interfered with contract. WAX does not contest that it opposed a proposed zoning law ordinance that would have benefited operators like VIP, that it petitioned public officials to enforce the zoning laws against VIP, that it petitioned the City Council for approval to provide cable television service to North Dallas in order to compete with VIP, and that it opposed VIP's application to transfer its CARS license. WAX does contend that such actions constitute legitimate petitioning and lobbying activities which are at the very core of the First Amendment right to petition the government for redress of grievances and, as such, were protected by the First Amendment from antitrust, § 1983, and tortious interference liability.

Any claim founded upon alleged wrongful conduct arising out of lobbying activities faces a threshold conflict with the constitutionally protected rights of petition and assembly. The right to petition for redress of grievances is "among the most precious of liberties safeguarded by the bill of rights." *United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983); *see also United Mineworkers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). Inseparable from the other rights entrenched in the First Amendment, the right to petition the government occupies a "preferred place" in our system of representative government, and enjoys a "sanctity and a sanction not permitting dubious instructions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The right to petition is logically implicit in and fundamental to the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

In various contexts, courts have held defendants constitutionally immune from liability for exercising their right to petition. *E.g.*, *Hylton*, 710 F.2d at 1106 (the filing of a legitimate criminal complaint with local law enforcement authorities constitutes an exercise of constitutional right to petition for redress of grievances notwithstanding that trespass complaint may have been motivated by desire to impede IRS agents' investigation or that agents' conduct may have been privileged or immunized); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-46 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) (42 U.S.C. § 1985(1)) (irrelevant to applicability of right to petition the government that its exercise might have the effect of causing professional harm to official about whom complaints are made or even that complainant may be aware of or pleased by the prospect of such injury); *Sawmill Products, Inc. v. Town of Cicero*, 477 F.Supp. 636, 642 (N.D.Ill. 1979) (§ 1983) (protesting presence of plaintiff's sawmill which was thereafter shut down by town ordinance is protected activity); *Weiss v.*

Willow Tree Civic Association, 467 F.Supp. 803, 816-18 (S.D.N.Y. 1979) (§ 1983) (lobbying town officials *en masse* was nothing more than peaceable assembly petitioning municipal authority for redress of grievances and filing state lawsuit and an administrative complaint to oppose zoning permit, even if groundless, did not amount to abuse of process to prevent plaintiffs from responding); *Aknin v. Phillips*, 404 F.Supp. 1150, 1153 (S.D. N.Y. 1975), *aff'd*, 538 F.2d 307 (2d Cir. 1976) (§ 1983) (citizens who urged village officials to remedy noise problem not liable for officials' application of unconstitutional nose ordinance against plaintiff's discotheque); *Sierra Club v. Butz*, 349 F.Supp. 934, 938-39 (N.D.Cal. 1972) (contractual interference) (filing lawsuit and administrative appeals to halt complainant's logging operation constitutionally privileged even if motivated by malice).

In the antitrust law context, the constitutional immunity flowing from the right of petition was first enunciated by the Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). The Court concluded that the Sherman Act does not prohibit two or more persons from associating together to attempt to persuade the legislature or executive to take particular action with respect to a law that would produce a restraint or a monopoly. *Id.* at 136. Later, in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court again applied the right of petition in a case involving a successful effort to influence government administrative action. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), *Noerr-Pennington* immunity was applied to anticompetitive attempts to influence the judicial branch of government by way of litigation activities.

The *Noerr-Pennington* doctrine was designed to protect the speech and associational activities of private parties petitioning the government. Such petitioning activity by interested individuals provides the flow of information

essential to the proper functioning of our democratic institutions. The doctrine is one of statutory construction rooted in the principle that the courts will not impute to Congress an intent to invade First Amendment freedoms or hinder the mechanisms of representative democracy. *Noerr*, 365 at 137-38; *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 909 (D.Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986) (per curiam).

Although the *Noerr-Pennington* doctrine was first applied in the antitrust law context, it has since been followed to immunize First Amendment activities from liability under 42 U.S.C. § 1983. *See, e.g., Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (§ 1983 action in which private citizens who persuaded county officials to open road across plaintiff's property were entitled to First Amendment immunity although citizens had met privately with county officials and deliberately excluded plaintiff from meetings); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980) (no violation of § 1983 in lobbying for zoning amendment); *Racetrac Petroleum*, 601 F.Supp. at 914 (alternative holding on § 1983 claims that all acts of defendants which worked to plaintiff's detriment were within protections of *Noerr-Pennington* doctrine and thus immune from liability under civil rights laws); *First Nat. Bank of Omaha v. Marquette Nat. Bank.*, 482 F. Supp. 514 (D.Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981) (*Noerr-Pennington* doctrine applied to render bank immune from civil rights liability for lobbying to procure passage of legislation resulting in bank credit card plan and instituting litigation to enforce such legislation); *Sierra Club v. Butz*, 349 F.Supp. at 937-39 (contractual interference).

Noerr-Pennington also applies in the context of the Texas common law tort of interference with contract. As noted above, under Texas law one cannot tortiously interfere with a contract if the act of interference is under-

taken with legal right or justifiable cause. *See State National Bank*, 678 S.W.2d at 689. Conduct which is protected by the First Amendment is conduct undertaken with legal right or justifiable cause within the meaning of the Texas law of tortious interference with contract.

VIP does not appear to quarrel with the foregoing *Noerr-Pennington* principles. Instead, VIP argues that *Noerr-Pennington* protection does not apply because (1) the actions that WAX succeeded in inducing were illegal, (2) there was an unlawful conspiracy between WAX and City officials, and (3) the absurd nature of the City's zoning interpretation was or should have been apparent to WAX. The court disagrees.

The court rejects VIP's contention that WAX's activities are not protected because WAX induced illegal action. In *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484, 1499 (5th Cir. 1985), the Fifth Circuit held that *Noerr-Pennington* protection applies where one petitions for legislation that ultimately turns out to be unconstitutional. Similarly, in the administrative context an ultimate determination that agency action sought was unauthorized by statute should not remove protection for petitioning conduct directed to the agency to obtain that action. Only where evidence shows that the defendant knew or should have known that the action he sought was improper would a court be justified in labeling his petition a "sham" not entitled to *Noerr-Pennington* protection. *Id.* at 1500. Here, the only acts of the City found to be improper are its interpretation and enforcement of the zoning law to deny VIP's free speech rights. WAX simply urged the city to enforce the law as the City had decided to interpret it. There is no evidence on which reasonable jurors could have relied to find that WAX knew or should have known that the actions it sought from the City were improper.[9]

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[9] The court also rejects VIP's contention that WAX is not entitled to *Noerr-Pennington* immunity because WAX should have known that the City's interpretation of the zoning law was "absurd."

The court also concludes that there is no factual basis in the trial record for the jury's finding[10] and VIP's contention that WAX is not entitled to *Noerr-Pennington* protection because it was a party to an unlawful conspiracy with the City. *Noerr-Pennington* does not, of course, protect activities that are not bona fide efforts to obtain government action. The doctrine does not authorize "sham" conduct, *Greenwood Utilities*, 751 F.2d at 1498, which is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor," *Noerr*, 365 U.S. at 144, and includes "vexatious litigation and unlawful conspiracies with government officials." *Greenwood Utilities*, 751 F.2d at 1498.[11] The evidence, however, points so strongly and overwhelmingly against a conclusion that WAX and the City engaged in an unlawful conspiracy that reasonable jurors could not have arrived at a contrary verdict.

That WAX entered into a franchise agreement with the City that restricted competition from unfranchised cable operators does not establish direct evidence of a conspiracy. *See Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, 612-13 (5th Cir. 1985) (taxicab company's success-

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[10] In light of the court's instruction that, absent a conspiracy, WAX's petitioning activities could not constitute a violation of the Sherman Act, the jury perforce concluded that WAX did conspire with the City in finding that WAX violated §§ 1 and 2 of the Sherman Act.

[11] In *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991, 1013 (S.D.Tex. 1981), *aff'd in pertinent part*, 735 F.2d 1555, 1567 (5th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 788 (1986), the Fifth Circuit described the sham and co-conspirator exceptions as two separate exceptions to the *Noerr-Pennington* doctrine. *Cf. Greenwood Utilities*, 751 F.2d at 1484, (co-conspirator exception subsumed in or part of sham exception). The court charged the jury in this action that "in the absence of proof of a conspiracy with government officials, Warner Amex's petitioning conduct cannot be labeled a sham." Court's Charge at 12.

ful efforts to secure from city an *exclusive* concession at airport were protected from liability by *Noerr-Pennington* doctrine, even if concession agreement was anticompetitive); *Woolen v. Surtran Taxicabs, Inc.*, 615 F.Supp. 344, 354-55 (N.D.Tex. 1985), *aff'd*, 801 F.2d 159 (5th Cir. 1986) (where evidence reflects at most mere adoption by cities of some of private defendants' proposals after close scrutiny and extensive debate by public and private entities, anticompetitive agreement was not evidence of conspiracy between defendants and cities). The evidence reflects that the award to WAX of the cable television franchise followed a year of intense competition by would-be franchisees. There is no evidence that the franchise agreement between WAX and the City was entered into other than after arms-length negotiations.

VIP suggests that certain acts by City officials demonstrate a conspiracy between WAX and VIP. Between November 1980 and October 1981 the Building Official issued permits containing restrictions on VIP's and Silver Screen's operations; the Chief Zoning Inspector requested that the Board of Adjustment apply the zoning laws to prohibit unfranchised cable companies from operating commercial television stations across lot lines in residential areas; and the City instituted a lawsuit against Cable Dallas, Inc. and its customers to enjoin violations of the zoning law. There is no evidence, however, that WAX had any unlawful contacts with the officials involved regarding these actions and proceedings or that City officials acted other than in the ordinary exercise of their official duties.

Although VIP refers to the actions of the Board of Adjustment, ZOAC, and the City Council in support of its conspiracy theory, there is no evidence of any unlawful contacts or communications between WAX and these administrative and legislative bodies. Without evidence

of unlawful contracts, the jury could not find that a conspiracy existed.

Both James and counsel for WAX opposed the Nichols amendment before the ZOAC, which rejected the Nichols proposal. This does not, however, demonstrate "an agreement [by ZOAC] to further the defendants' monopolistic goals." The evidence shows nothing more than public arguments before a public body of the City and an independent determination by that body. There was no evidence that ZOAC was coerced, bribed, defrauded, or otherwise corrupted in any way in reaching its decision.

VIP also points to evidence of "private meetings" between WAX officials and agents and City officials, such as a June 1981 meeting between WAX president Davis and Public Utilities Director James in which James agreed to ask the Building Inspector to enforce the zoning laws against VIP. Such meetings, which WAX has acknowledged occurred, are not unlawful. In *Evers v. County of Custer*, for example, the Ninth Circuit held that defendants' acts of complaining to commissioners, attending commissioner's meetings, talking to individual commissioners about a problem while deliberately excluding plaintiff, and expressing a hostile attitude toward plaintiff at these meetings did not amount to a conspiracy. 745 F.2d at 1204.

The court concludes that WAX's conduct was protected by the First Amendment as set forth in the *Noerr-Pennington* doctrine and that the evidence is such that reasonable jurors could not have found otherwise.

C. City § 1983 Liability

The City contends the court should grant judgment notwithstanding the verdict as to VIP's speech claim [12]

[12] Because the court concludes that VIP is entitled to recover on its restraint of speech claim, the court does not discuss the taking or equal protection predicate offenses.

because there is no evidence that VIP's speech was in fact restrained. City argues that VIP's operations were essentially unfettered and that the three-day temporary cessation of service was self-imposed by VIP. VIP responds that the issuance of the violation notices, without more, violated VIP's First Amendment rights because the notices had a "chilling effect" on the full and free exercise of such rights by VIP. The court agrees.

In *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 615 F.Supp. 916, 934 (N.D.Tex. 1985) (Robinson, J.), *appeal pending* (No. 85-1572, 5th Cir.), for example, the district court held that a labor organizer's First Amendment rights were violated by the issuance of an *ex parte* temporary restraining order, notwithstanding that the organizer obeyed the order. The holding in *Gault* is predicated on the theory, set forth in *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), and *Aebisher v. Ryan*, 622 F.2d 651 (2d Cir. 1980), that the threat of coercive power may violate First Amendment rights even though the chilling effect of the governmental action falls short of a direct prohibition against speech. This is so because the threat of sanctions may deter the exercise of First Amendment freedoms as potently as would the application of sanctions. 615 F. Supp. at 934. Here, VIP, and the apartment complexes to whom VIP provided cable television, were served with notices which stated "You are hereby notified to remove Cable TV facilities and cease illegal use within fifteen days." This action constituted a threat by the City to use its coercive power against VIP and thus effectively restricted VIP's freedom of speech.

The City argues, however, that content-neutral [13] time, place, and manner regulations on speech are acceptable

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[13] There is nothing in the record to imply that the content of VIP's programming was pornographic or obscene. The court is thus not to be understood as holding that a cable operator would have an unfettered First Amendment right to transmit such material.

so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, —— U.S. ——, 106 S.Ct. 925, 928 (1986). The jury found from a preponderance of the evidence, however, that the City's regulations did not leave to VIP reasonable alternative avenues of communication. There is no basis upon which to disturb the jury's verdict in this respect.

The City also contends that VIP cannot recover under § 1983 because there is no evidence that VIP was injured by a City policy. The City argues that the zoning notices served on VIP and its customers were issued by city inspectors who acted under the supervision of the Building official, whose decisions were, in turn, subject to review by his superiors and the City's Board of Adjustment. Under the City's theory, the Building Official's interpretation of the Code was not City policy because his decisions were subject to review and because there was no evidence that the City Council expressly or impliedly authorized the Building Official to act in lieu of the governing body. The court disagrees.

Official policy is a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmakers have delegated policymaking authority." *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984). The Dallas City Council is empowered to regulate and restrict the use of land in the city. TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon Pamp. Supp. 1987). The evidence shows that on September 2, 1981 the Dallas City Council, after a briefing on the zoning interpretation to be applied against VIP, instructed City officials to issue citations if VIP was in fact crossing property lines. This evidence is sufficient to show City policy.[14]

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[14] The City also argues that, because VIP did not appeal the zoning interpretation to the Board of Adjustment (the body em-

III.

Having concluded that VIP is entitled to recover $200,000 in actual damages from the City, the court also concludes that VIP is entitled to recover its attorney's fees and expenses incurred in prosecuting its § 1983 action. *Brantley v. Surles*, 804 F.2d 321, 325 (5th Cir. 1986) (prevailing party may recover fees in action to enforce § 1983). The court will determine the attorney's fees award from affidavits. As required by *Nisby v. Commissioners Court of Jefferson County*, 798 F.2d 134, 137 (5th Cir. 1986), VIP's affidavits shall be in the form necessary to enable the court to make the required *Johnson* analysis. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980) ("*Copper Liquor II*"). Such affidavits and any supporting memorandum shall be filed no later than June 8, 1987.[15] The City may file a responsive memorandum and affidavit(s) if filed no later than June 22, 1987. The court will thereafter enter a judgment.

WAX's motion for judgment NOV is GRANTED. The City's motion for judgment NOV is GRANTED in part and DENIED in part. VIP's motion for partial new trial is DENIED and its motion for judgment on the verdict is GRANTED in part and DENIED in part. The mo-

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powered to hear and decide appeals from determinations by administrative officials) there was no official interpretation of the Code with respect to the Code's application to VIP, and thus VIP was not injured by a policy of the City. The question whether the Building Official could exercise final authority is not before the court in light of the court's ruling that the City Council's action in instructing City officials to issue citations evidences City policy.

[15] VIP may simply supplement the affidavits it has already filed, but such supplementation must parse the § 1983 services from other services and must enable the court to make the required *Johnson* analysis.

tion to add Frank Parrish and Jack Weiss as parties-plaintiff is DENIED as moot.

SO ORDERED.

May 19, 1987.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
United States District Judge

Supreme Court, U.S.
FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VIDEO INTERNATIONAL PRODUCTIONS, INC.,
Petitioner,

—v.—

WARNER-AMEX CABLE COMMUNICATIONS, INC.
and THE CITY OF DALLAS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT WARNER-AMEX CABLE COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit properly held that Respondent Warner-Amex Cable Communications Inc. ("Warner") was protected from antitrust, civil rights and common law tort liability in this case by the First Amendment because Warner simply petitioned the City of Dallas ("City") to enforce existing laws, and because there was no evidence at trial that Warner or the City of Dallas engaged in any corrupt activity, or that the governmental process was corrupted in any way.

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BRIEF OF RESPONDENT WARNER-AMEX CABLE COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Warner-Amex Cable Communications Inc.[1] ("Warner") respectfully submits this brief in opposition to the petition for a writ of certiorari of Video International Productions, Inc. ("VIP").[2]

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1 Respondent Warner-Amex Cable Communications Inc. is wholly-owned by Warner Communications Inc. Warner Communications Inc. or its wholly-owned subsidiaries own more than twenty percent of the common stock of Atari Corporation. In March 1989, Warner Communications Inc., and Time Inc. proposed to merge their companies, but that merger proposal has not been presented yet to their shareholders.

2 The City of Dallas recently submitted a petition for a writ of certiorari in this case on March 10, 1989. That petition was denied by this Court on May 2, 1989.

COUNTERSTATEMENT OF THE CASE[3]

VIP's claims against Warner for alleged violations of the antitrust and civil rights laws, and the Texas common law, were based entirely on evidence that after Warner bid for, and won, a cable franchise in Dallas, Warner engaged in petitioning and lobbying activities related to that franchise. There was no proof of any corrupt conduct by Warner or by any City administrators, nor was there any evidence that the governmental process was corrupted in any way.

A. Competition to Receive a Dallas Cable Television Franchise

In 1979, the Dallas City Council solicited bids for a cable television franchise in Dallas by issuing a Request for Proposals ("RFP") prepared by an independent consultant. At least six companies, including Warner (but not VIP), submitted proposals. The nine-member City Council voted to award the franchise to Warner in November 1980, and thereafter approved the franchise agreement.

The franchise award and agreement were the subject of a public referendum held on April 4, 1981, and were approved overwhelmingly by Dallas voters. The franchise agreement was then adopted as Dallas Ordinance No. 16738.[4] Section 7 of the franchise agreement contained a cable franchise provision, included at the suggestion of the City's independent consultant, which read:

> "No [cable television] system shall be allowed to occupy or use the streets of the City or be allowed to operate within the City without a [cable television] franchise."

Although VIP challenged the lawfulness of Section 7 on appeal, it offered no evidence at trial that the franchise agreement, or any of its provisions, was unlawful or that Warner or any City official knew that the franchise agreement was unlaw-

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3 This statement relies solely on evidence that was uncontroverted at trial.

4 VIP's petition incorrectly implies that the franchise agreement was enacted as an ordinance in November 1980. *See* VIP petition at 4.

ful. Nor did VIP ask that the jury be charged regarding the lawfulness of any of the provisions of that agreement. Further there was no evidence at trial that the City's franchise procedures were in any way improper, or that Warner was involved in any corrupt or unlawful activity in the franchising process.

B. Warner's Petitioning and Lobbying Activities

1. Opposition to a Proposed Amendment to the Zoning Laws

VIP complained of communications between Warner and the City which took place in late April and early May 1981 concerning a request by Silver Screen Company ("Silver Screen"), a company unaffiliated with VIP, that the Dallas Zoning Ordinance Advisory Committee ("ZOAC") recommend amending the Accessory Use provision of the Dallas zoning law. Silver Screen's proposed amendment would have enabled commercial, unfranchised cable television operators such as Silver Screen to cross property lines in residential neighborhoods; that is, to run cables from an operator's earth station on one residential lot across property lines to adjacent residential lots that were under different ownership.[5] Silver Screen sought this amendment because the Dallas Board of Adjustment had affirmed, in March 1981, a Dallas building official's determination that the Accessory Use provision could not be relied upon to permit commercial cable television operators to lay cables across property lines in residential areas.[6]

The communications complained of by VIP were limited to three meetings between Warner representatives and responsible City administrators regarding the nature of the proposed

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5 Historically, the Accessory Use provision of the Dallas Development Code authorized otherwise prohibited activities in residential areas if they were "accessory" to the principal permitted use and were located on the same lot. "Accessory uses" include swimming pools, garages, worksheds, etc., which are "customarily incidental" to the main residential use of the land.

6 Warner had no communications with the building official with respect to this determination, and did not participate in the Board of Adjustment proceeding.

amendment, its potential impact on Warner's franchise, and Warner's opposition to the proposed amendment. At those meetings, Warner opposed the change.

On May 18, 1981, ZOAC held a public hearing on the proposed amendment, and heard from all interested parties, including counsel for Silver Screen, outside counsel representing Warner, and City administrators. ZOAC then deliberated privately, and voted not to recommend the amendment. No ZOAC member spoke privately with any Warner representative at any time regarding the proposed amendment.

2. Communications with Officials Regarding VIP's Apparent Violations of the Zoning Laws

VIP also complained that, in June 1981, Warner requested City administrators to investigate whether VIP was operating in violation of the Dallas zoning laws. Warner's request was based on VIP's public application to the Federal Communications Commission ("FCC") for a microwave (CARS) license, which suggested that VIP was transmitting television programming via cable across property lines in residential areas, in violation of Dallas zoning law.

The Dallas building official responsible for enforcing zoning regulations conducted an independent investigation, and confirmed that VIP's facilities in residential districts were crossing property lines in violation of the zoning law, as that law had been interpreted in the prior rulings by ZOAC and the Board of Adjustment. Accordingly, in September 1981, the City issued zoning violation notices to VIP. During the City's investigation, Warner made intermittent inquiries as to its status. VIP was not denied access to public officials during this process, and there was no evidence of any improper or illegal conduct by Warner or City officials.

3. Warner's Petition for Permission to Provide Interim Cable Service

VIP's evidence also included a written petition that Warner filed with the City Council on September 2, 1981, requesting

authority to provide cable service in the North Dallas area sooner than contemplated by the franchise agreement's schedule. At the time, VIP and other companies had begun providing cable service to apartment complexes in North Dallas and were seeking to sign additional complexes to exclusive ten-year contracts. Warner sought permission to compete in the North Dallas area before it was foreclosed by its competitors' exclusive contracts.

There was no evidence that Warner or the City Council engaged in any corrupt, unlawful or unauthorized activity regarding this petition. Nor was there any evidence that VIP (or any other competitor) was denied access to the City Council to oppose Warner's petition, which was a matter of public record and debate.

4. Warner's Opposition at the FCC to the Transfer of VIP's CARS License

Finally, VIP complained that Warner filed written comments opposing VIP's application to the FCC for authority to transfer VIP's newly-acquired CARS microwave license to a company known as Cable Dallas, Inc. ("Cable Dallas"). Warner's comments were submitted pursuant to FCC procedures that invite public reaction. *See* 47 U.S.C. § 309. Prior to any FCC action, VIP withdrew its application, and voluntarily relinquished its CARS license.

C. The District Court's Decision

Following a jury verdict against Warner and the City, the District Court granted Warner's motion for judgment n.o.v. The District Court held that Warner's conduct was protected by the First Amendment principles enunciated in the *Noerr-Pennington* doctrine from any liability under the antitrust laws, the civil rights laws, or Texas common law, because Warner "simply urged the City to enforce the law as the City had decided to interpret it." VIP Petition ("VIP Pet.") at 45a. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v.*

Pennington, 381 U.S. 657 (1965).[7] The District Court recognized, after a careful review of all the evidence, that there was nothing in the record to support VIP's claims that Warner was engaged in any "sham" petitioning, or that Warner was engaged in an unlawful conspiracy with the City that might eliminate *Noerr-Pennington* protection. *See* VIP Pet. at 45a-46a.

D. The Court of Appeals' Decision

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision, holding that Warner could not be liable to VIP under the antitrust laws and the common law because the evidence showed that Warner was simply "exercising its First Amendment right to petition the government, and this was fully protected by the *Noerr-Pennington* doctrine." *See* VIP Pet. at 15a-16a.

The Court of Appeals rejected VIP's argument that there was evidence to support an exception to the *Noerr-Pennington* doctrine. The Court reasoned that the "sham" exception to the *Noerr-Pennington* doctrine would only apply if Warner had not engaged in its petitioning activity to achieve a goal other than to force VIP to waste time and money defending itself. In this case, however, it was virtually conceded that Warner's petitioning and lobbying was designed to achieve its stated goal of

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7 In support of its decision, the District Court cited, *inter alia*, *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (private citizens who persuaded county officials to open a road across plaintiff's property were entitled to First Amendment immunity from plaintiff's federal and state law claims); *Gorman Towers, Inc. v. Bogosalvsky*, 626 F.2d 607, 614 (8th Cir. 1980) (First Amendment immunity under section 1983 for lobbying activities that led to amendment of zoning laws); *Pendleton Constr. Corp. v. Rockbridge County*, 652 F. Supp. 312, 324-25 (W.D. Va. 1987), *aff'd*, 837 F.2d 178 (4th Cir. 1988) (lobbying efforts to oppose issuance of special use permits under the zoning laws were immune from liability under antitrust laws and section 1983); and *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892, 912 (D. Md. 1985), *aff'd per curiam*, 786 F.2d 202 (4th Cir. 1986) (private party's petition to government to deny competitor's zoning application was immune from claims under section 1983 and state law).

enforcing the Dallas zoning laws. VIP Pet. at 13a. The Court of Appeals also concluded that a so-called "co-conspirator" exception to the *Noerr-Pennington* doctrine did not apply because there was no evidence of a "corrupt conspiracy" between Warner and the City; that is, VIP failed to prove that a City official had been influenced by Warner through some corrupt means. VIP Pet. at 13a.

Finally, the Court of Appeals reasoned that Warner, as a private party, could not be liable under the civil rights laws, 42 U.S.C. § 1983, unless there was evidence that it acted under color of state law to deprive VIP of its constitutional rights. VIP Pet. at 15a. Although VIP argued that an illegal conspiracy existed between Warner and the City, the Court recognized that Warner's successful petitioning and lobbying activities did not establish that Warner was acting under color of state law as a "co-conspirator" with a City official. VIP Pet. at 16a. Relying on this Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980), the Fifth Circuit concluded that there must be evidence of a "corrupt conspiracy", such as that required to abrogate *Noerr-Pennington* protection, to support a finding that Warner's petitioning and lobbying activities amounted to conduct under color of state law. The Fifth Circuit recognized that no such evidence existed as to Warner.

REASONS FOR DENYING THE WRIT

VIP's petition attempts to create a novel issue for review from a very routine decision by the Court of Appeals. The decision below simply applied the *Noerr-Pennington* doctrine to VIP's claim that Warner's petitioning and lobbying conduct violated the antitrust laws and Texas common law, and further held that VIP could not circumvent the *Noerr-Pennington* doctrine by alleging that Warner's petitioning amounted to activity "under color" of state law that deprived VIP of its rights under 42 U.S.C. § 1983. Although VIP argues that this decision establishes a new affirmative defense of "good faith immunity" under the civil rights laws, the Court of Appeals' reasoning in fact recognizes only that Warner cannot be held liable

merely for being on the "winning side"; there must also be evidence that a "corrupt conspiracy" existed between Warner and the City in order to eliminate *Noerr-Pennington* protection and to establish that Warner acted under color of state law. In sum, nothing in the Fifth Circuit's opinion, which is based on the specific facts of this case, presents an issue that is appropriate for review by this Court.

POINT I

THE COURT OF APPEALS' DECISION DOES NOT PRESENT ANY ISSUE REGARDING AFFIRMATIVE DEFENSES OR IMMUNITIES AVAILABLE TO PRIVATE PARTIES UNDER SECTION 1983

VIP's petition argues that the Court of Appeals improperly created an "affirmative defense or an immunity" when it relied on the subjective motivation of the City in rejecting VIP's claim against Warner under 42 U.S.C. § 1983. VIP also asserts that there is a conflict in the various federal circuit courts of appeal on this issue. This argument is no more than a futile effort to invent an issue for review, because the subject of affirmative defenses or immunities under section 1983 was not reached by the lower courts.

The Fifth Circuit's decision on VIP's section 1983 claim was limited to whether Warner acted "under color" of state law. The Court reasoned correctly that "[i]n order for a private party to be liable under section 1983, it must have acted under color of state law," and that Warner's "first amendment petitioning of the City does not constitute action under color of state law unless [Warner] acted as a co-conspirator with the City" by influencing City officials "through some corrupt means." *See* VIP Pet. at 15a-16a; 13a. *See also Dennis v. Sparks*, 449 U.S. 24, 28 (1980); *Affiliated Capital Corp. v. Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986).

After reviewing the evidence in the light most favorable to VIP, the Court of Appeals concluded that there was no proof

of an illegal conspiracy. The Court found nothing in the record to suggest any corrupt activity by Warner, *or* any evidence that City officials had any selfish, venal or otherwise corrupt motives, or acted in a manner not consistent with the City's interests. *See* VIP Pet. at 13a, 16a. In sum, the Court surveyed both the objective and the subjective evidence produced by VIP, and determined that there was nothing to support VIP's conjecture that the City and Warner were "jointly engaged" in a scheme to deprive VIP of its constitutional rights. *See* VIP Pet. at 11, 15a.

Because the Fifth Circuit decided that Warner was not acting under color of state law, it was unnecessary for the Court to address any questions concerning an affirmative defense of "good faith immunity" under 42 U.S.C. § 1983. VIP's reference to cases raising questions concerning this good faith immunity defense, in an effort to create a conflict among the circuits, is misplaced. *See* VIP Pet. at 10-11. Moreover, these cases are inapposite because none of them involved a claim that petitioning and lobbying activities by a private party amounted to a conspiracy with a state official. Most of the cases cited by VIP presume that a private party has acted under color of state law by setting in motion an unconstitutional pre-judgment attachment or garnishment process, and address whether the private party is entitled to an affirmative good faith immunity defense. By contrast, VIP's claim here is not that Warner directly exercised state authority, but that Warner's petitioning and lobbying somehow amounted to a corrupt attempt to influence City officials to enforce the zoning ordinance against VIP. The good faith immunity decisions relied on by VIP simply do not address this claim.[8]

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8 Again endeavoring to create a "conflict," VIP argues in a footnote that the Court of Appeals' decision here is inconsistent with its earlier decision in *Folsom Investment Co. v. Moore*, 681 F.2d 1032, 1037-38 (5th Cir. 1982). VIP never raised this argument in its application for rehearing in the Court below. The issue is not subject to review in this Court. *City of Springfield v. Kibbe*, 480 U.S. 257, *reh'g denied*, 481 U.S. 1033 (1987); *E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 25 n.1 (1986).

(*Footnote continues on the following page*)

POINT II

THE FIFTH CIRCUIT'S DECISION WAS BASED ON SOUND REASONING AND PRECEDENT

VIP next argues that there are "four significant errors in the Fifth Circuit's reasoning." VIP Pet. at 12. This argument not only fails to present an issue suitable for review by this Court, it also lacks foundation in the record.

According to VIP, the Court of Appeals' first error was to give undue deference to Warner's First Amendment right to petition the government. To support this theory, VIP ignores the evidence at trial, and fancifully insists that Warner's right to petition "is due considerably less deference when it entered into a conspiracy with a governmental entity in a fraudulent or illegal scheme." VIP Pet. at 12. However, both the District Court and the Court of Appeals, after a thorough review of the record, found no evidence to support this claim of a "fraudulent or illegal scheme." Nor does VIP's factual recitation identify such evidence. The Fifth Circuit properly recognized Warner's First Amendment rights when the proof at trial demonstrated that it was engaged only in legitimate petitioning and lobbying activities.

The Court of Appeals also erred, in VIP's view, when it "misread *Dennis v. Sparks*, 449 U.S. 24 (1980)." VIP Pet. at 12-13. However, the Fifth Circuit's decision merely quotes the *Dennis v. Sparks* case for the unremarkable proposition that a private party which petitions the government cannot be deemed to have conspired with a state official simply because the private party is on "the winning side"; rather, there must be proof of a "corrupt conspiracy," such as one involving bribery of a

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In any event, the *Folsom* decision has no relevance to VIP's claim of a corrupt conspiracy, because it considers only whether a private party may claim an affirmative defense of good faith immunity for innocently invoking a seemingly valid, but in fact constitutionally infirm, state law. *Folsom* does not consider whether a private party has acted under color of state law simply when it successfully petitions and lobbies the government.

state official, to establish that a private party was "jointly engaged" in prohibited action. *Id.* at 28. These principles are not only well supported by *Dennis v. Sparks*, they are essential to protect a private party's right to petition the government under the First Amendment. *United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983), *quoting United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (First Amendment right to "petition for redress of grievances . . . among the most precious of the liberties safeguarded by the bill of rights"); *Stern v. United States Gypsum*, 547 F.2d 1329, 1342 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) (fact that citizen's grievance motivated by financial self-interest does not weaken right to petition where right is "logically implicit in and fundamental to the very idea of a republican form of government").

VIP next asserts that the Fifth Circuit failed to recognize the "corruption" established by the City's decision to enforce long-standing zoning laws against VIP. *See* VIP Pet. at 13. Although VIP characterizes the City's enforcement of the existing zoning laws as "misuse of City power for non-governmental ends," the record shows that restrictions on "accessory uses" and commercial television operations in residential areas were fully consistent with long-standing Dallas zoning regulations, and independent determinations by City officials interpreting these regulations. VIP Pet. at 5a-7a; 45a. Moreover, no City official stepped outside the scope of their authority in enforcing these zoning laws against VIP. VIP Pet. at 47a. Accordingly, the Fifth Circuit did not overlook any "corruption," because none existed.

Finally, VIP argues that the Fifth Circuit erred when it focused on "the subjective motivation of the City actors" in considering VIP's section 1983 claim against Warner. As discussed above, the Court considered whether there was either objective *or* subjective evidence of an illegal conspiracy that would support a claim that Warner was acting under color of state law. The Court of Appeals recognized initially that there was no objective evidence, such as bribery, coercion or other improper influence, to support an inference of conspiracy. VIP

Pet. at 13a. Then, the Court recognized that there was no subjective evidence—such as a City official's "selfish or otherwise corrupt motive"—the "minimum" required by the case law to give rise to such an inference. VIP Pet. at 15a-16a; 13a. Having failed on both counts, VIP cannot now allege that the Fifth Circuit's thorough review had an improper "focus."[9]

POINT III

VIP'S NOVEL TEST FOR NOERR-PENNINGTON ANALYSIS HAS NO MERIT

VIP also urges that the Court of Appeals' analysis of whether Warner acted under color of state law for purposes of section 1983, and whether Warner was protected from antitrust and common law liability under the *Noerr-Pennington* doctrine, should have been based on whether Warner "knew or should have known" that the action it sought was illegal or improper. *See* VIP Pet. at 15. VIP cites no authority for this novel proposition and it has no merit under the circumstances here.

VIP presented no evidence to the jury, and the jury was never charged, with respect to whether the provisions of the publicly-endorsed cable franchise, or the City's independent interpretation of the zoning laws, were illegal or improper. Similarly, VIP did not offer any evidence that Warner "knew or should have known" of any illegality or impropriety. As a result, the jury could not properly have reached a verdict based on this test, and the Fifth Circuit could not have employed it even if it were valid.

Further, VIP's "knew or should have known" test is fundamentally inconsistent with the First Amendment and principles of federalism. If a private party cannot petition or lobby the government for a particular goal without first determining that

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9 VIP's fifth (unnumbered) assertion of error—that the Court of Appeals improperly rejected the argument that Warner would be subject to section 1983 liability if it knew or should have known what it was seeking from the City was illegal or improper—is discussed in Point III, *infra*. *See* VIP Pet. at 14.

the goal is neither "illegal" nor "improper," First Amendment activity will be substantially chilled. In addition, federal courts will be barraged with collateral challenges to the decisions of government agencies, on the ground that parties seeking to petition those agencies "should have known" of the illegality or impropriety of the relief they were seeking. *See Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 916 (D. Md. 1985), *aff'd per curiam*, 786 F.2d 202 (4th Cir. 1986). These consequences are plainly unacceptable, and VIP's novel test therefore could not have been enunciated by the Court of Appeals.

CONCLUSION

For all the reasons set forth above, VIP's petition should be denied in all respects.

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Respectfully submitted,

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